

THE LAW AND ADMINISTRATION OF
SUBDIVISION REGULATION:
A STUDY IN LAND USE CONTROL

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DEDICATION

This dissertation is dedicated to my mother and father, who showed me the value of education; to my wife, Betty, for her faith and reassurance during the long years of study, research, and writing required to complete doctoral work; and to Richard, Guille, and Susan, who also grew tired of my attention to this dissertation.

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CHAPTER I

INTRODUCTION

The United States today is predominantly an urban nation. More than two-thirds of the population is now concentrated in urban areas. It was not always thus; at the turn of the century we were still primarily an agricultural, rural society.¹

In recent decades we have experienced an explosive population growth in this country, and most of that growth has centered in urban areas. In the decade from 1950 to 1960 the total population grew from 151,326,000 to 179,323,000, or an increase of 18.5 per cent. The most significant fact, though, is the growth rate experienced by the urban areas. The 212 Standard Metropolitan Statistical Areas increased by 23.6 million people from 1950 to 1960, an increase of 26.4 per cent, compared with the 7.1 per cent growth rate of the country as a whole.² Further, twenty-three of these SMSAs have 35 per cent of the total United States population.³ It is clear that urban areas have been the focus of this population increase.

It is said that cities are chiefly the result of explosive population growth and advance industrialization, with the industrial revolution bringing a specialization in products and in labor and,

¹Bollens & Schmandt, The Metropolis 12 (1965).

²Bureau of the Census, U.S. Dep't of Commerce, County and City Data Book 13-18 (1962).

³Ibid.

thereby, fostering a mutual interdependence best served by the close proximity of man and machines of industry in an advantageous location. Some comparative figures show the correlation between industrialization and urbanization. West Germany and France, industrially advanced, claim urban populations of 74 per cent and 57 per cent, respectively; while two much less industrialized countries, China and India, claim urban populations of only about 5 per cent.⁴

The tremendous changes in population growth and movement that have occurred in our own country in the past half-century have had vast repercussions for our whole society, particularly our cities, and the end is not yet in sight. Our cities and their environs have been greatly affected by the rampant urbanization of recent years.

We have been aware that this process of urbanization was occurring, and we have occasionally expressed amazement at the rapid rate at which our cities and their suburban fringes have expanded.⁵ However, most of us have not been sufficiently aware of the impact on our cities. It has been estimated that if world population continues to increase at the rate currently predicted, by the year 2000 more people will live in cities and towns than exist in all the world today.⁶ The impact in the United States of this estimated increase will be phenomenal.

Are our cities ready for the great increase that is forecast for the next few years? Most of them are not. Indications are that they were not ready for the growth that has already taken place, and,

⁴Lilienthal, "World Wide Urbanism a Force in America's Future" 5 Metropolitan Area Problems 1 (1962).

⁵A wide range of articles exists in various kinds of publications from legal journals to Redbook.

⁶Lilienthal, supra note 3, at 5.

as recent experience shows, many cities have no systematic plans for expansion. The outward movement of cities in recent years has been largely haphazard, and there have been many unfortunate consequences as a result. We might, therefore, pause now, in the face of a forecast of great future growth, and take a long, critical look at how our cities are expanding and what we should do about urban land use⁷ in general.

Why do people crowd into cities and then spill out into the surrounding countryside? In very early times crowding together in walled cities was a necessity for purposes of defense, and then, because efficient and rapid means of transportation and communication were lacking, it was desirable for business and trade purposes. In modern times, of course, industry has brought this concentration in cities. However, in our time overcrowding has been most excessive, and it has been due to avoidable causes. Until recently,

. . . urban life was comparatively simple, but with the great increase and concentration of population, problems developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.⁸

Since urban life is no longer simple, we in the urban areas today are practically forced to cooperate with our neighbors, whether we desire it or not. Restrictions on urban land use are the manifestation of this required cooperation, but so far we in this country have failed to regulate adequately the use of urban land.⁹

⁷"Urban land use is a term commonly used to refer to the spatial distribution of city functions -- its residential communities or living areas, its industrial, commercial, and retail business districts or major work area, and its institutional and leisure time functions." Chapin, Urban Land Use Planning 3 (2d ed. 1965).

⁸Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

⁹This study has not been concerned with truly rural land or its control.

What are the results of failure adequately to restrict and control the use of urban lands? Many of the results are visible enough to the casual observer. In a leading case the court declared that "Land overcrowded with buildings is both the most prevalent and worst evil of cities,"¹⁰ and this overcrowding generally leads to deterioration. At least equally visible, and probably more real, to most urban and suburban residents is the traffic congestion that seems to plague all cities of any size. And ". . . both over building and traffic congestion have been the result of failure to regulate the centralization of major facilities for transportation and the proper distribution of economic activities."¹¹

In short, our cities are prime examples of unplanned, unregulated growth. Like Topsy, most of them "just grewed," and the results are something less than satisfactory. What are our unplanned cities like? There is deterioration in the desirability of certain residential sections, caused by the encroachment of industrial and commercial businesses, and the consequence of this is destruction of property values¹² and, ultimately, perhaps, slum areas.¹³

Uncontrolled growth has given us a great many other problems; aside from overcrowding of urban land, slums, decreased property values, and traffic congestion. We also can see downtowns with no parking places, collection, empty stores, and tax problems; whole streets of garish lights and signs, costly expressways that attempt to solve the

¹⁰Lewis v. District of Columbia, 89 App. D.C. 72, 190 F. 2d 25 (1951).

¹¹Adams, Outline of Town and City Planning 153 (1935).

¹²8 McQuillin, Municipal Corporations 148 (3d ed. 1949).

¹³See Chapter III for a full treatment of the problem.

transportation problem; arterial ways lined with junk yards, honky-tonks, cemeteries, drive-in restaurants and theaters, shopping centers, and, of course, the ubiquitous automobile service stations that, cheek by jowl, crowd the highways. And finally, from time to time, there are the "jump-jumps," "putt-putts," and "batt-batts."¹⁴ All too often one finds a mish-mash of land uses -- residential, commercial, industrial -- throughout a locality, with no separation of each use into zones or districts according to their nature. This situation makes for uncertainty for the homeowner, because a desirable residential section may change overnight, with an invasion by business establishments putting gasoline stations (very frequently the opening wedge for residential "block-busting," even where some sort of zoning exists), a grocery, or a laundry next to homes. There are many, many other consequences of uncontrolled growth that are easily and frequently seen. Uncoordinated capital improvement programs, for instance, will often see a town tearing up newly paved streets in order to lay water or sewer or power lines. Many citizens must wonder why these things occur, but they may not be aware that planning programs could alleviate many of these problems. Inadequate public facilities, such as schools and recreation areas, and heavy burdens on utility systems are further consequences of uncontrolled growth. These urban problems are largely the result of inadequate or absent land use controls.

The problem is further compounded by the attitude many city and county officials have, namely, that any growth is good for the community. It is high time that these officials realize that all growth and develop-

¹⁴Bartley, Urban Planning I (University of Florida, Public Administration Clearing Service, Civic Information Series No. 39, 1962).

ment, per se, is not good. Surely it is becoming clear that unplanned, uncoordinated, unguided, and uncontrolled growth only causes problems; it does not help the situation occasioned by explosive urbanization, ". . . at least not in a manner esthetically pleasing, financially responsible, or beneficial to the economic, social, and cultural development of the community."¹⁵ It cannot be denied that a systematically planned and developed city is more attractive to home owners, businesses, and industry, each of which needs the protection afforded by land use controls, than a city that develops haphazardly with all the attendant dangers.¹⁶

How can disorderly growth be checked, thus precluding the problems that such growth invariably presents? How can a city control its growth and the development of land areas within and contiguous to its boundaries? Urban planning, relying heavily upon its tools of implementation, especially subdivision control, can provide a great deal of aid. It can do a lot, but planning is not a panacea, and should not be so viewed.

A city that relies on planning for its future can develop largely as it wishes, generally speaking. The ordinary planning program and its tools cannot do a lot for an area that is losing population because of a decline or loss of its economic base, a situation that many towns in the coal mining areas of Appalachia have been facing for several years. There are other external forces over which a city can exert little control, such as the location of a space-age installation, that can be dominant. Still,

¹⁵Id. at 4.

¹⁶McQuillin, supra note 12, at 157.

under ordinary circumstances, planning is an invaluable means of guiding development. On the other hand, "... it would be extremely difficult to estimate the enormous waste and unnecessary private and public expense that poor planning or complete lack of planning has entailed."¹⁷ This waste and the consequences of no foresight and no planning for the future by local officials are seen about us everywhere.

What is planning? One of the most complete definitions is this:

City planning may be regarded as a means for systematically anticipating and achieving adjustment in the physical environment of a city consistent with social and economic trends and sound principles of civic design. It involves a continuing process of deriving, organizing, and presenting a broad and comprehensive program for urban development and renewal. It is designed to fulfill local objectives of social, economic, and physical well-being, considering both immediate needs and those of the foreseeable future. It examines the economic basis for an urban center existing in the first place; it investigates its cultural, political, economic, and physical characteristics both as an independent entity and as a component of a whole cluster of urban centers in a given region; and it attempts to design a physical environment which brings these elements into the soundest and most harmonious plan for the development and renewal of the urban areas as a whole.¹⁸

It must be recognized, however, that even planners do not agree exactly on what planning is. The discipline is too new, and agreement may not be reached anytime soon, if ever. However, "working definitions" are possible and definitely useful.

It might be said that urban planning is, in short, the accommodation of the various interests seeking expression in the local scene to the interest of the community as a social unit. Planning is an art and a science which deals with land use in terms of economic betterment

¹⁷Id., at 13.

¹⁸Chapin, supra note 7, at XIV.

and social progress.¹⁹

Planning deals with all aspects of the physical and economic and social development of the city. In time past planning has been understood as a means of dealing with physical development, but newer approaches recognize that planning is definitely more than physical planning. It is concerned with streets, utilities, airports, parks, and parking, of course, but it is also concerned with slum clearance, housing, rehabilitation, housing for the elderly, schools, playgrounds, open space, public health, and capital budgets to provide facilities for people. Most of these activities involve the regulation of private property in order to achieve community goals.

Planning is "... essentially a process of understanding human needs and of influencing and shaping future public policy to serve those needs most effectively."²⁰ Planning, on the basis of professional assessments and community values, aims to correct and/or minimize the effects of past mistakes and to avoid them in future developments.²¹

The concept of planning is not new. There was planning in Palestine thirteen hundred years before Christ, and Aristotle, writing in the fourth century B.C., said that "... ingenuity must be applied in planning cities to gain maximum advantage of site conditions."²²

There was some planning in the United States in early years; William Penn laid out the city of Philadelphia on a grid pattern in 1682.²³

¹⁹Grosso v. Bd. of Adjustment, 137 N.J.L. 630, 631 61 A.2d 167, 168 (1948).

²⁰Webster, Urban Planning and Municipal Policy 4 (1958).

²¹Adrian, State and Local Governments 457 (1960).

²²International City Managers Association, Local Planning Administration 1 (3d. ed. 1959). [Hereinafter cited as ICMA]

²³Adrian, supra note 21, at 457.

Then in the eighteenth century there were isolated instances of planned cities, both here and abroad,²⁴ but not many, and in the next century there was only "informal planning," as exemplified in the latter part of that century by study groups concerned with "civic improvement" and the idea of the "city beautiful."²⁵

So it might be said that systematic planning in the United States dates from William Penn and 1682, but in reality most American cities had a chaotic, unplanned growth until recent decades. These were forerunners of planning, not planning as we know it today.

In rural areas Americans were even less concerned with planning than their urban fellows ". . . until the coming of the automobile and the telephone which made possible the ribbon developments along arterial highways."²⁶

The first official city planning commission was established in 1907 and the first national conference on city planning was held in Washington, D. C., in 1909.²⁷ So planning in any formal sense is recent.

It was not until after the Chicago World's Fair that cities began to show more than a casual interest in city planning, and even then it was widely heralded as "city beautification," with emphasis on esthetics for a good many years thereafter.²⁸ However, once it was recognized that city planning was more than "city beautification" its adherents tended to become interested in the guidance and direction of the physical development of the city. And while the primary emphasis today is still on

²⁴Washington and Paris, for example.

²⁵Phillips, Municipal Government and Administration in America 463-64 (1960).

²⁶Adrian, supra note 21, at 457.

²⁷Phillips, supra note 25, at 465-66.

²⁸Robson, Great Cities of the World 14 (2d ed. 1957).

physical growth, planning is concerned with all aspects of community development.

Planning has been generally accepted by the people of the United States, according to some students of the urban scene, because

. . . increased mobility of people and products, a growing population and increased concentration in urban areas, rising standards of living, the increased interdependence of communities as well as individuals, a shorter work week, increased leisure time and various social trends, changing technology, the demand for the preservation of various natural resources -- these and a host of other modern-day factors have caused a nationwide interest in community and area planning during the past few decades. Traditionally, planning, primarily zoning, was motivated largely to protect the public health and comfort . . . More recently, it has become apparent that planning has a very broad impact on the total development of a community or region and in the furtherance of various public policies.²⁹

Practitioners of planning argue that planning has not been generally accepted. Some people are interested, yes, and some pay planning a sort of lip-service, but general acceptance is not the case, even in towns and regions which have planning programs. Most any public hearing on a proposed zoning ordinance will verify this point. People usually do not accept planning until they see some tangible proof of the material gains to be derived from planning, and planners and local officials are not allowed the tools to make such demonstrations. The answer is perseverance on the part of the planners in improving their methods and patience in education of the public - a long, grinding process - to the benefits that can be derived from proper planning.

At any rate, whether "generally accepted" or not, planning is the "conscious and deliberate guidance" of the community's thinking

²⁹League of Kansas Municipalities, Planning Tools: Theory, Law, Practice I (1962). [Hereinafter cited as LKM]

so that the goals the community can agree upon can be attained.³⁰ Planning is a basic and fundamental approach to the problems that confront us in urban areas. Planning is a point of view, an attitude, an approach, an assumption that we can anticipate, predict, and control our own urban destiny.³¹

The objective of planning is to promote the welfare of the community by "helping to create an increasingly better, more healthful, convenient, efficient and attractive environment."³² How is this goal achieved? By working out and adhering to a comprehensive plan for the city.

There are three stages in the process of urban planning. First of all, a city must determine what resources and facilities the city possesses. Several types of basic studies must be made in order to make that determination. There will have to be a careful survey of present land use (normally presented in the form of a land use map); a study of facilities such as utilities, streets, parks, equipment, and buildings, a report on population and population trends for the area; an economic base study; an analysis of the local government's fiscal status; and an examination of all relevant legal provisions, such as state and local laws on planning, zoning, subdivision regulation, building and housing codes and inspections.³³

³⁰Yokley, Zoning Law and Practice 4 (2d ed. 1953).

³¹Adrian, supra note 21, at 457; Trecker, The Group Process in Administration 232 (rev. ed. 1950).

³²ICMA, supra note 22, at 10.

³³Fordham, Local Government Law 695 (1949).

The second phase is perhaps the toughest; certainly it is the least understood. Here the community will formulate its general and specific planning objectives. That is, goals will be identified. The process of working out the goals ought to be a democratic one, and it should be generally recognized that planners are not omnipotent. The city's plan is a guide for orderly development of the entire city, and it should be the product of the thought of the city's citizens. As the comprehensive plan takes shape, it will be a compromise between the professional recommendations of the staff and the demands of various interests which make their views known to the commission and the local governing body.³⁴

The comprehensive plan will have several major parts. There will be a population and economic base study, a land development plan, a thoroughfare plan, a community facilities plan, a neighborhood analysis, and a capital improvements program.

These various elements should be taken by the planning board and the local legislative body as a set of guideline propositions. Development policy should be developed on the basis of these plan elements.

Unfortunately, "master plans" often are not kept current through periodic revision of the elements,³⁵ and this produces a certain rigidity.

Comprehensive or Master Plans

It might, therefore, be better not to talk about "master plans," a phrase which conveys the idea of a plan-in-a-package, inflexible and enforced (or forgotten!), but to speak in terms of a "comprehensive plan."

³⁴Adrian, Governing Urban America 460-62 (2d ed. 1961).

³⁵Ibid.

One prominent writer has this thought about comprehensive planning:

The main idea is that if there is general planning for the whole, detailed planning for the parts is likely to come out much better. A subsidiary hypothesis is that it is a good idea to organize the more important facts before making decisions. Hence the planning agency collects, organizes, analyzes, and reports information of importance to policy makers whose decisions affect urban development.³⁶

In the process of comprehensive planning the information thus gathered ". . . is combined with current public policy to point the way to . . . priorities. . . and action."³⁷ The action program which should emerge from good comprehensive planning produces more for the tax dollar, based on brief but conclusive experience, than the kind of things that happen without comprehensive planning. Planning does not eliminate all mistakes, but it reduces the number of them.

Comprehensive planning brings less likelihood of bulldozing truck routes through residential neighborhoods, strip commercial slums, mislocated schools, blighted central business districts, disjointed capital improvement programs, and all the rest.

A comprehensive plan must be a current, organized, documented statement of the problems of a city and an organized program of action calculated to solve or alleviate those problems. It is important to realize that facts change constantly, public policy changes, needs and desires change, standards change, techniques change, and legal, financial, administrative and political patterns change. For this reason planning, if it is to be effective, must be constantly changing, forward moving process. Planning is a continuous operation that requires periodic

³⁶Bair, Bair Facts 128 (1960).

³⁷Id. at 129.

revision but constant attention. It is

. . . an attempt to maintain a current and reasonably inclusive statement of development problems matched with a set of solutions involving action programs which fit together and reenforce each other, and which make sense in terms both of particular problems and of the overall problem.³⁸

The third phase in the planning process is implementation of the plan, and this is the crux of the whole process. The best of plans is of no value if laid to rest on the shelf.

Surveys and studies are important; they are necessary to fix policies and objectives. But plans and goals are worthless if not acted on. They must be implemented.

Tools of Plan Implementation

The tools available for implementing a city's comprehensive plan are many and varied. Most persons do not realize the kinds of devices available to a city which desires to exert control over its development. Cities and counties are creatures of the State, and they have only that authority conferred on them by the State. Therefore not all cities or counties will have all these powers, and when they do, the powers may be limited in various ways. Tools for plan implementation may be divided into several major categories. The basis for plan implementation is, of course, governmental authority, which is ". . . exercised through a number of important, long established powers . . . possessed by governments whether they engage in conscious planning or not."³⁹

³⁸ Ibid.

³⁹ Webster, supra note 20, at 267.

It must be realized that planning per se adds nothing to the substantive powers a government possesses. The powers described briefly below may be exercised whether there is a planning program or not, but planning may determine the need for and afford the occasion for exercise of certain of these powers. It is necessary to have an understanding of the nature of these powers and the legal limitations that restrict their use in order to focus on subdivision regulation as one of the tools.

The city's fiscal powers

Every government must have the power to raise and expend money in order to carry out its responsibilities. Cities can raise revenue, incur debt, borrow, make expenditures, collect and distribute funds, and make appropriations. They can levy taxes and special assessments.

Under the financial power there are three important considerations for planning: (1) the assessment of taxes is important to subdivision regulation as it relates to undeveloped lands; (2) the power to expend money for capital improvements, such as utility facilities and schools and parks, is closely related to land development; and (3) special assessments can be levied by a city to finance needed improvements in new subdivisions.

The city's power of eminent domain

Eminent domain is used to acquire land or easements by condemnation. It is "... an essential governmental power used for the purpose of taking private property for a public use."⁴⁰ Eminent domain is an

⁴⁰Id. at 269.

inherent power of the sovereign state. It is not inherent in municipal corporations; it is power that must be conferred on a city.

Under this power a city may take any private property within its jurisdiction for a public use without the consent of the owner, subject to payment of just compensation as prescribed by law. Eminent domain is important to planning because it is by use of this power that cities condemn and acquire land for various uses: streets and highways, urban redevelopment, and public facilities of many kinds.

Eminent domain is not the same as the power of taxation and is not the same as the police power, though it is frequently confused with one or both in people's minds.

The city's power of proprietorship

A city is engaged in many enterprises and is the owner of considerable property. A city owns streets, of course, which it acquires by dedication, purchase, or condemnation; it owns land and buildings; and it owns or operates utility systems. All three of these broad areas are of importance to planning because of the tremendous bargaining power they allow the city, particularly in dealing with land developers. It could well be that the bargaining position the city possesses by virtue of its power of proprietorship may be more significant in terms of development control than the police power. This matter will be discussed more fully in a subsequent chapter.

The city's police power

The general police power is "...the most comprehensive and

pervasive of all powers of government. . . ."⁴¹ It is a regulatory power which restricts the use of property in the public interest and can prevent a property use that is harmful to public welfare. In its original and broadest sense, the police power denoted the inherent power of every sovereign to control man and things,⁴² but it is not quite so broadly defined today. It is "limited" to the power to establish the social order, protect life and health, secure persons' existence and comfort, and safeguard them in the enjoyment of private and social life and the beneficial use of their property.⁴³

This power governs the manner in which each person may use his property when regulation becomes necessary in the public interest, and it may be broadly used to promote the general welfare of the state or the community.⁴⁴ It is a flexible power, not rigid or fixed, but elastic enough to meet new conditions that arise from changes in the social and economic order.

The police power is important for planning because no other power available to a city ". . . is so far-reaching with respect to relationships between government and the individuals personal and property interest." ⁴⁵

The city's land use controls

This major category is comprised of subdivision regulations,

⁴¹Id. at 270.

⁴²Munn v. Illinois, 94 U.S. 113 (1877).

⁴³Webster, supra note 20, at 270.

⁴⁴Ibid.

⁴⁵Webster, supra note 20, at 272.

zoning ordinances, building and construction codes, housing codes, architectural controls, and mapped streets ordinances. Each of these is designed for a specific purpose, and the most effective plan implementation is achieved if they are used to supplement each other.

Mapped streets ordinance. - Under this, projected future streets or other public areas are designated on an official map, which is recorded; this prevents erection within the boundary lines of designated areas of structures that would have to be removed when a street or area is opened. In some jurisdictions only streets are included; in others, streets, parks, playgrounds, school sites, and other uses.

Architectural controls. - The purpose of architectural controls is to prevent excessive uniformity or excessive disparity in architectural styles. Many communities have adopted a method of architectural controls, some preferring to use private covenants, some relying on an ordinance which appoints a board of review. Decisions upholding boards of review have been based largely on the general welfare aspects of the police power and not solely on the basis of esthetics. Some states do not allow esthetics as a valid legal consideration; in others esthetics may be considered only in conjunction with other recognized bases for the exercise of the police power.

Building, construction, housing, plumbing, gas, fire, and electrical codes. - The primary function of the various kinds of codes is to safeguard public health and safety through the regulation of

⁴⁶State ex rel. Saveland Park Holding Corp. v. Wieland, 269 U.S. 269, 69 N.W. 2d 217 (1955).

building construction, use, and maintenance, and through the installation of utilities and the provision of certain kinds of services. Such codes reduce hazards - quake, wind, fire, flood, lightning - and disease, accident, and injury due to carelessness and neglect. Basically the objective is to provide a sound building.

Zoning. - Zoning is one of the major tools of plan implementation. Its purpose is to distinguish various kinds of land use and to allot sufficient area for each. Zoning is vital because it separates various uses into definite zones, in order to protect each category of use. Zoning is

. . . the governmental regulation of the uses of land and buildings according to districts or zones. It is a means of insuring that land uses within the community are properly situated in relation to one another, that adequate space is available for various types of developments, and that the density of development in each area is held at a level which can be properly served by governmental facilities and will permit light, air, and privacy for persons living and working within the community.⁴⁷

To accomplish its purpose a city can zone with regard to land usage, lot area, population density, size of all yards and open spaces, building set-backs, parking, signs, and billboards; it can prohibit some uses, can eliminate some existing uses. In addition to controlling industrial and commercial noises, fumes, smoke and particle emissions, zoning can even control erection of structures in the air space approaches to airports.⁴⁸ Zoning has become an infinitely sophisticated tool, with new approaches and techniques being developed all the time to meet new needs emerging in a complex society.

⁴⁷LKM, supra note 29, at 15.

⁴⁸Yokley, supra note 30, *passim*.

Planning and zoning are often misunderstood, and many times the words are used interchangeably. The distinction between planning and zoning is a most important one, and it should be clearly understood.

A leading court decision states that zoning

. . . is a separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use . . . It is the dedication of the districts delimited to particular uses designed to subserve the general welfare. It pertains not only to use but to the structural and architectural design of buildings.⁴⁹

Planning, as opposed to zoning, ". . . is a term of broader significance. It connotes a systematic development contrived to promote the common interest in matters that have from the earliest times been considered as embraced within the police power."⁵⁰ Planning is conceptual. It is concerned with systematic development of a municipality along lines determined by the people in the common interest. Zoning is implementive. It is concerned exclusively with land use regulation,⁵¹ aiming at the most effective utilization of land.

Zoning has been known as a "preventive" device, intended to deter community blight and deterioration by prescribing standards for uses in separate areas and by assisting in the control of new buildings. It requires similar uses in given areas and, thereby, helps keep out blighting factors and helps keep up property values in all areas. It must be pointed out here that this concept is changing somewhat, though not rapidly. Some courts are now more prone than ever before to allow zoning "for the future" rather than using it as a preventive tool.

⁴⁹Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (1938).

⁵⁰Ibid.

⁵¹McQuillin, supra note 12, at 12.

Zoning is the oldest tool of plan implementation; it was known as far back as the Romans, who used zoning to restrict the location of certain buildings and businesses. Zoning in the United States had its forerunners in the seventeenth century, when towns regulated tenements, factories, garages, theatres, and billboards. Boston, Salem, and Charleston, among others, controlled the location of slaughter houses and distilleries, and in the eighteenth century the premises of chandlers, couriers, and potters were added to the list of those regulated.⁵² Most of this early zoning was based on the use of the "nuisance technique," starting with the practice in colonial cities of zoning such things as gun powder storage out of the center of town. Other nuisances appeared as time went on.

Modern zoning, however, is purely a product of the twentieth century. Attesting to this is the fact that the first comprehensive zoning ordinance in the United States was not enacted until 1916, and not until 1926 did the United States Supreme Court uphold the concept of zoning, in the land case of Euclid v. Ambler Realty Company.⁵³ The late start of comprehensive zoning in this country has been attributed to "... the tendency of our courts down through the years to protect and preserve individual rights in property against the arbitrary control thereof by municipalities."⁵⁴

The theory of zoning, according to Yokley, is to foster improvements by confining certain classes of buildings and uses to certain localities without causing owners undue hardship.⁵⁵ Prior to general

⁵² Rathkopf, Zoning and Planning 1 (3d ed. 1956).

⁵³ 272 U.S. 365 (1926).

⁵⁴ Yokley, supra note 30, at 12.

⁵⁵ Id. at 12.

public acceptance of zoning in this country, haphazard location and use of buildings existed in all our municipalities.⁵⁶ Zoning attempted to remedy this situation by imposing regulations that would exclude new uses and structures prejudicial to the preservation of the true character of a neighborhood.

Zoning which regulates the use of land, irrespective of the ownership of it, aims not primarily at protecting the value of property of particular individuals, but instead at promoting the welfare of the whole community.⁵⁷ Zoning does protect property values, of course, but it is intended to do more, ". . . to insure the availability of adequate light, air, and accessibility to all property. It protects the public health and minimizes the number of fire hazards."⁵⁸

A New Jersey court decision outlines the basic consideration of zoning:

The essential considerations of zoning require the municipality to adhere to basic purposes (including security from fire, panic and other dangers; promotion of health, morals, and general welfare; adequate light and air; prevention of overcrowding and of undue concentration of population; the character of the district and its peculiar suitability for particular purposes) with a view to conserving the value of property and encouraging the most appropriate use of land throughout such municipality.⁵⁹

Inquiry shows that comprehensive zoning has been generally accepted in the United States, but other devices for plan implementation have not been accepted. Why has zoning gained this acceptance? It has been said that ". . . zoning is an offspring of urgent urban necessity."⁶⁰

⁵⁶Rathkopf, supra note 42, at 3.

⁵⁷Shermwell v. Speck, 265 S.W. 2d 468 (Ky. 1954).

⁵⁸Adrian, Governing Urban America 464.

⁵⁹Thornton v. Village of Redwood, 111 A. 2d 899 (N.J. 1955).

⁶⁰Lewis v. District of Columbia, 89 App. D. C. 72, 90 F. 2d 55 (1951).

But urban necessity today is so urgent as to call for recognition of other tools of plan implementation, too. Those which are vital to planning but which have not yet received judicial support. One may wonder why zoning has been more acceptable. One view has it that action

. . . in the field of planning for the small community frequently begins with ideas of zoning because the abuses to be corrected by this device are most painfully obvious to the average citizen. The zoning ordinance appears to be a very direct attack upon undesirable situations. It is readily understood and enthusiasm for its enforcement can be generated easily.⁶¹

It seems, then, that zoning has three characteristics which give it a certain advantage: it may correct clearly undesirable conditions, it is a very direct attack upon abuses, and it can gather very enthusiastic adherents.

Our antipathy for regulation of private property notwithstanding, when it became obvious that much damage to the community was occurring as the result of failure to regulate urban land use and when the many benefits of zoning became evident, its popularity increased.⁶² There can be no doubt that zoning was a most radical departure from traditional concepts of private property, but the need for it -- arising from increasing population density and multiplying forms of business activity and the increasing complexity of our civilization -- was so great that conservatives, liberals, and progressives all accepted zoning.⁶³ Originally very radical in its departure from our customary ways of thinking and doing, zoning has now become the standard method of insuring the efficient use of land and

⁶¹ Address by Ronald Scott at the National Planning Conference, May, 1958.

⁶² Yokley, supra note 30, at 4.

⁶³ McQuillin, supra note 12, at 13.

It is the first - and probably the only - device considered by the general, uninformed, uncritical public for implementation of the comprehensive plan. Other devices for implementation, equally valuable, should be granted acceptance, but apparently the need is not obvious to very many people.

One well-known scholar in urban affairs claims that "... the most extensive and most important controls in planning are those imposed by zoning ordinances."⁶⁴ In terms of development, acceptance, and reliance upon and effectiveness of the various tools he is right. However, there are other devices and techniques that potentially offer at least as much promise as zoning, and probably more promise under specific types of developmental circumstances. Competent planning and zoning alone do not guarantee a "city beautiful,"⁶⁵ nor can they insure the most efficient utilization of urban lands.

Subdivision regulation. - Of all the land use control devices available, the potential of subdivision regulation is probably the greatest. One experienced planner has this to say about its value:

In the process of exercising this planning implement (zoning) in the public interest, municipal authorities are prone to overlook a planning tool capable of greater accomplishments with far less efforts. The process of subdivision control is a powerful and effective device for achieving a desirable community environment and all communities both large and small would do well to examine their position in this regard. If they are now exercising subdivision control, the process should be reviewed for maximum effectiveness. For those communities that have not adopted this device, it is highly recommended because nothing is more fundamental to the proper growth of the community.⁶⁶

⁶⁴Phillips, supra note 25, at 475.

⁶⁵Adrian, supra note 34, at 464.

⁶⁶Scott, supra note 61.

Again, the same planner says that "... when compared with zoning, a well-administered subdivision control is more useful in achieving planning goals and its influence is far more lasting."⁶⁷

Subdivision regulation is the control by a public authority of the platting and conversion of raw land into building lots. A city can control the subdivision of real estate by forcing the developer to meet requirements and standards established by the city in return for the privilege of recording a plat and selling off lots. The cumulative effect of land subdivision is so extensive that public control of this activity is required. The impact of unregulated subdivision of land is felt in tax burdens, the high cost of extending utilities, street and traffic problems, over-loaded schools, health hazards caused by sewage disposal systems unsuited to a particular area, and so on.

Subdivision regulation is crucial, because once large tracts of land are broken up into individual parcels, the pattern of development is irretrievably set. Thus a subdivider is taking action that is of tremendous importance to the community - to the homeowner, to the governing body, and to the general public, the taxpayers. It is through subdivision regulations that the community interest is expressed - and protected.⁶⁸

Subdivision control plays a fundamental role in the development of a community because "... although a city is something more than a total of its land subdivisions, much of the form and character of the city will be determined by the quality of these subdivisions and the standards which are built into them."⁶⁹

⁶⁷ Ibid.

⁶⁸ Bair, supra note 36, at 46-48.

⁶⁹ American Society of Civil Engineers, Land Subdivision (Manual of Engineering Practice No. 16, 1946).

The subdivision of land is clearly the first step in building communities.

Once land has been cut up into streets, blocks, and lots, and publicly recorded, the dye is cast and the pattern is difficult to change. For generations the people who occupy such land will be influenced by the character of its design.⁷⁰

A well-known scholar in urban affairs underscores the opportunity offered municipalities by subdivision control:

When vacant lands are improved, the municipality has its best and sometimes its only opportunity to obtain the pattern of land development with which it must live in the future. The amount of money which many cities are compelled to spend annually for street widening, redesign, relocation of utility lines, slum clearance, and redevelopment is grim evidence of the cost of failure to develop vacant property in a proper manner.⁷¹

Perhaps it seems odd that the influence of subdivisions on the community is not more widely recognized. This lack of recognition is due in part to the nature of the subdivision process. It occurs largely on paper, and the quality or lack of quality in the land involved is not obvious to the public.⁷² It is also quite true that rather loud and long objection by real estate speculators to public control of the subdivision process has tended to hamper and delay the public acceptance of this planning device.

At any rate, it is quite clear that today most large cities are paying high costs for their failure to establish adequate public controls over the subdivision of land.⁷³ Traffic congestion, blighted areas, slums, increased cost of public improvements, and other defects are attributable

⁷⁰ *Ibid.*

⁷¹ Webster, *supra* note 20, at 436.

⁷² Scott, *supra* note 61.

⁷³ Webster, *supra* note 20, at 436.

in large measure to imperfect land subdivision."⁷⁴ Because they did not regulate years ago, cities now must ask their planners to work on the rehabilitation of blighted areas and slums; this is work of a curative kind, and cities might instead be working on preventive aspects of urban problems. In spite of a preponderance of evidence which shows the costs to the community of failing to exercise control over its own growth, ". . . a number of communities have engaged in costly replanning and re-development projects without having put into effect adequate subdivision controls to prevent a repetition of the same process in other areas."⁷⁵ It seems that ". . . growth, surge, decay, and recuperation have characterized most of the world's urban centers from their beginnings. . . ." ⁷⁶ Good planning and the use of all tools of plan implementation, particularly subdivision control, could enable us to change this traditional cycle in our cities. Much of the decay could be prevented, and thus the recuperation would be unnecessary.

The purpose of subdivision control is to prevent congestion of population and to provide land development in accord with established design standards, to create sound neighborhood patterns, and to integrate the area involved - sooner or later - into the community as a whole.⁷⁷ For this purpose, the regulations usually establish standards to be met in construction of public improvements and often require the developer to provide basic improvements before he can sell any of his lots.

⁷⁴Scott, supra note 51.

⁷⁵Webster, supra note 20, at 436.

⁷⁶ICMA, supra note 22, at 149.

⁷⁷KLM, supra note 29, at 23.

In a word,

The primary objective of subdivision control is to assure that the land subdivided will constitute a permanent asset to the community and will provide the maximum degree of health, comfort, convenience, and beauty consistent with true economy.⁷⁸

Early attempts at subdivision control are likely to be clumsy and inefficient, as is the case with many new devices, but continued use will prove its value. Maximum effectiveness can be obtained only if there is a land use plan and a mapped streets plan, because these are prerequisites to good subdivision control. All these tools of planning implementation must be coordinated for best results.

How does subdivision control fit into the context of planning? Subdivision control is closely connected to the process of comprehensive community planning. Subdivision control, like zoning, could be carried out without long range planning, but would be limited to the prevention of obvious mistakes - such as excessive street grades, awkward intersections, and substandard improvements - in an individual plan. This would be subdivision control at its weakest. While this alone would be of considerable value,

. . . the true measures of success are the creation of sound neighborhood patterns; integration of residential development with other land uses; acquisition of sites for public parks, schools, and other facilities; and the continuation of the transportation network, among others.⁷⁹

Subdivision control, therefore, is an integral part of the planning process, an important tool of plan implementation, and if the municipality has not developed a comprehensive plan "intelligent subdivision

⁷⁸Webster, supra note 20, at 437.

⁷⁹ICMA, supra note 22, at 345.

control is not possible."⁸⁰ It is in this broad operation, based on a comprehensive plan, that subdivision control's greatest contribution to orderly community growth can be made. Here is subdivision control at its best.

The unpleasant experience with uncontrolled subdivision in the 1920's taught some people in this country a real lesson. Control of the subdivision process has been recognized in some areas as an important part of land use plans and controls. However, the extent of this recognition certainly varies from state to state and depends upon a number of factors. The statutes of all states, save one,⁸¹ make some sort of provision for subdivision regulation, but "An examination of these statutes, however, indicates a wide variation in their provisions,"⁸² and the extent of enforcement also varies greatly from state to state.⁸³

Why the great variation in acceptance of and reliance on subdivision regulations? The need for public regulation, in the public interest, has not been equally visible in all areas. The effects of poor subdivision practices are not immediately seen by the general public, our traditional respect for property is a factor, and many of the developers apply considerable pressure on councils and commissions in order to avoid regulation.

The subdividers tend to think of their developments as complete and separate projects, not as a unit of the city with a definite relation to other streets, to utilities, to parks, and to schools, and so on.⁸⁴ But

⁸⁰Webster, supra note 20, at 438.

⁸¹The exception is Vermont.

⁸²Webster, supra note 20, at 441.

⁸³See Chapter VII for a full discussion of administration and enforcement of subdivision regulations.

⁸⁴ICMA, supra note 22, at 346.

these subdivisions are a part of the city and have a tremendous impact on that city. Therefore, the cities ought to be able to exert some influence on new subdivisions to make them meet the city's requirements, to make them comply with the city's comprehensive plan and with the city's established subdivision regulations.

If the cities cannot exert any control over the subdivision of land the result is low-grade or substandard subdivisions, excessive or premature development of land, or partial development.

The Object of This Study

The object of this study, then, is to investigate the regulation of land subdivision as a tool of plan implementation, as a means for local governments to control growth in and around their boundaries.

This study deals with subdivision control. Subdivision regulations are enforced by units of local government. This study is concerned with the power of cities and counties to enact and enforce regulations. A large part of the subdivision activity occurs outside the cities, and where there is no extraterritorial jurisdiction, the regulatory problem becomes one for the counties. Though the discussion often centers around municipal actions and capabilities, the study is concerned with subdivision regulation, which can be enforced by cities and counties.

Subdivision regulation is not the only tool of implementation, of course, but it is a primary tool and a major study is direly needed. This study examines the problems caused by uncontrolled growth, explores the legal history, and points out, in a discussion of case law, what controls over land subdivision have received judicial approval and what attempted controls have not. The administration of subdivision regulation has been

investigated, with a view toward summarizing administrative procedures and problems, again including a review of case law. Here the writer's personal experience with subdivision administration over a rather wide area offered valuable insights into this problem area.

Up to this point the study will be largely historical and descriptive in nature. This alone would be valuable, but it is not enough. From this point on, the emphasis of the study changes to analysis, rationale, and recommendation.

It is the writer's desire to examine the critical issues for subdivision regulation. Out of this will come ideas about how subdivision control might be used in the future, suggestions for innovations to make this tool more effective, and reasoning derived from case law to make subdivision control more acceptable to the judiciary. This analysis should provide a major contribution to the law and administration of land use controls. This section, coupled with the earlier, largely descriptive sections of the study, will provide planners, lawyers, city and county officials, and the courts of the land a document of great value.

It is felt that this study can provide a rationale for courts across the land as they adjudicate subdivision control cases. All too often the judges in one jurisdiction are unaware of issues already contested in other jurisdictions that would provide them a basis for deciding a case at hand. By discussing all the significant cases in this area of law and by analyzing the trend of the decisions the public interest will be served, for the various courts will have a source of complete information at hand, as well as a reasoned argument justifying

subdivision controls in general and new innovations designed to guard the public interest in particular.

This study has been and is now desperately needed by all those with a working interest in urban affairs - planners, officials, teachers, researchers, lawyers, and judges. The recent publication of one book on this same subject has not in any way diminished the need for this study. That book was rather narrow in approach; it devoted no attention to the dimensions of the problem of uncontrolled growth, and the cases were not analyzed. The author simply strung together a "rule" from all the cases on subdivision law. This approach and this book did not fill the need.

This dissertation will examine the dimensions of the problem, analyze case law and administrative procedures, discuss the critical issues, bring out the evolving trends in regulation, and produce a rationale or justification for new - or largely unaccepted - techniques that are needed to provide meaningful control in this vital area. For this reason, it should be a major contribution to the area of urban affairs, one that cuts across more than one field or one discipline in its impact and significance.

CHAPTER II

AMERICAN ATTITUDES ABOUT LAND

Speculation in land, as Cornick pointed out,¹ is as old as America itself. It is an American tradition, and has been a dominant factor in development of the United States.

Speculation in land has been a tradition in America and was in fact a major motivating force in opening the West. . . . This speculative bent still colors American attitudes towards the land and is a factor to be reckoned with in attempting to control its use.²

The prospect of quick fortune has always lured, and speculation has played a beneficial part in the development of our country.

Speculation has its malevolent aspects as well. "Unbridled land subdivision as a get-rich-quick scheme has left ugly scars on nearly every major city and many of the smaller cities in the United States."³ In the fringe areas around our cities there is frenzied competition for land, and". . . much is heard concerning speculators and/or developers who have made quick fortunes. Less is said concerning blighted hopes or investments lost."⁴ Even less has been heard concerning the effect of speculation on the community and its taxpayers.

¹ Cornick, Premature Subdivision, passim (1938)

² Delafons, Land Use Controls in the United States 6 (1962).

³ American Society of Planning Officials, Performance Bonds for the Installation of Subdivision Improvements 20 (Planning Advisory Service Rep't No. 48, 1953).

⁴ Walker, "Land Use and Local Finance", Tax Policy 3 (1960).

Speculative activities are concentrated in fringe areas because in these areas "... just beyond today's suburbia there is little planning, and the development is being left almost entirely in the hands of the speculative builder."⁵ The fact of little or no regulation, coupled with the availability of inexpensive land attracts the speculator. Low cost, and often low quality, houses and developments can be built. The developer understandably "... follows the line of least resistance, and in his wake is left a hit-or-miss pattern of development."⁶

This sprawl, fostered by speculative practices, is bad economics, it is bad for farmers, industry, utilities, railroads, recreation groups, and developers themselves -- in short, it is bad for the whole community and the whole area.

The fringe areas continue to attract speculators. No doubt "fashion trends" lend themselves to speculative activity in the fringes. Developers are aware of the desire of many urban dwellers to change to suburban living, and they capitalize on this trend. Regardless of "fashion trends," many developers prefer fringe area locations anyway, because of "... freedom to speculate in land sales without the need for heavy investments in improvements."⁷

It is obvious that problems of land use planning increase in relation to the amount of development, and the rate of development in this country has been and is fantastic. Recent figures show that 3,000 acres per day are bulldozed for new development here in America. This

⁵Whyte, "Urban Sprawl," *Fortune*, January, 1958, p. 102.

⁶*Id.*

⁷Engelbert, ed. The Nature and Control of Urban Dispersal 23 (1960).

contrasts with the approximately 30,000 acres per year developed in England and Wales. Over the past five years housing production in the United States has averaged 1,300,000 units per year.⁸ This tremendous growth reflects the large, though now diminishing, quantity of land available in this country, the expanding population, the influence of the automobile and our resultant desire for suburban living, and the prosperity that allows so many Americans to own their homes. This growth also reflects the dominant American attitude on land use, an attitude of little concern for the rate at which land is used and a belief that all development is necessarily and inherently good, probably because someone is making money out of it.

As one foreign observer said, ". . . despite this rampant growth, it is very rare in America to encounter any antipathy to new development. Quite the opposite is usually the case."⁹ The attitude is correctly discerned. To most Americans, unfortunately, development is progress, even if the development is substandard, premature, improperly located, and a drain on the public purse.

To many Americans it seems un-American to restrict private ownership and use of land. However, as the few surveys of earlier subdivision practice have shown, ". . . unrestricted private ownership of land has encouraged an anti-social and uneconomic utilization of property in the typical American city,"¹⁰ and speculation has resulted in premature, poorly planned, substandard subdivision, the over development

⁸Delafons, supra note 2, at 5.

⁹Ibid.

¹⁰On "Public Land Ownership" 52 Yale L. J. 634-635 (1942-43).

of land in some concentrated areas, development of unsuitable land, poor location of subdivisions, water and sewage problems, overloaded schools, tax problems, financial difficulties, foreclosures, and all the rest.

The prevailing attitude of general unconcern for the rate at which land is being consumed by new developments of various kinds is born of our collective confidence that the supply of land is somehow unlimited. This attitude has been termed the "prairie psychology."¹¹

Convinced that there was a never-ending supply of land, devoted to the rights of property, and adhering to the free market and free enterprise, many Americans have proceeded to develop their land, displaying a formidable antipathy to any governmental control over private development.

The dominant feeling was that "... land uses are most efficiently organized if the decisions are made by the market. . . ." ¹² The "market," however, is not some abstract entity. It is made up of people, some of them unsuspecting, uninformed purchasers, some of them ethical men in the development business, some of them speculators, and some of them, apparently, just crooks. Still, until very recent times, land use decisions were made by private individuals, in particular the realtors, the land developers, and the bankers, all of whom were interested in personal profit. Certainly "... nineteenth-century Americans did not believe that a greater community interest stood above that of the profit motives of these men." ¹³

¹¹Delafons, supra note 2, at 6.

¹²Id. at 9.

¹³Adrian, Governing Urban America 457 (1961).

Land Speculation in the Nineteenth Century

Land speculation in the nineteenth century is of great interest because it indicates the strength of a tradition that today leads many Americans to deplore controls. Cornick explains how such a tradition began:

In 1825, the first boat traversed the entire length of the canal from Buffalo to Albany. . . . The incentives to premature subdivision. . . at once came into play, and urban lots began to grow in numbers even more rapidly than the population.¹⁴

In this respect it seems that there has been little change from 1826 to the present.

There were notable booms in real estate in New York in 1835 and 1865, as well as the boom of the Twenties, and each of the earlier booms was followed by a bust as well, coming in 1837 and 1873, respectively.¹⁵

A good account of what occurred in these booms and busts is recorded in the diary of Philip Hone, who observed that "The rage for speculating in land on Long Island is one of the bubbles of the day. Men in moderate circumstances have come immensely rich. . . ." ¹⁶ Hone pointed out that ". . . real estate is high, beyond all the calculations of the most sanguine speculator. Immense fortunes have been made and realized within the last three months." ¹⁷

Another observer adds this comment on land speculation during this period:

The City of New York not only displayed unwonted activity of trade in all its channels, and a great increase of public and private buildings, but also furnished capital for like

¹⁴Cornick, *supra* note 1, at 5.

¹⁵*Id.*, *passim*.

¹⁶Hone, *The Diary of Philip Hone 1828-1851* 131 (1889).

¹⁷*Id.* at 139.

enterprises elsewhere, even to the laying out of streets and avenues in imaginary cities expected to spring up in remote districts, to thrive by trade and manufactures not yet created, and to be occupied by inhabitants not yet born.¹⁸

The attitude may seem a trifle sarcastic, but the observer was more sensible and more realistic than many people during that period. He anticipated the bust that presently came.

New York State was not an island of speculation. Speculation has existed at various times in all parts of the country. Monchow showed that there were also booms and busts in the Chicago area over a long period of time. There was the "canal boom" in 1836, the "boulevard boom" in 1872, the "electric line boom" of 1890, and the "rapid transit boom" of 1926. These were the major periods of activity, activity that led to the existence in 1939 of 2,000,000 vacant subdivided lots in Chicago -- enough to accommodate 15,000,000 people, or triple the city's population at that time.¹⁹ Miss Monchow found that ". . . further scrutiny . . . shows that speculative appeals. . . have supplied the impetus for the successive waves of subdividing activity which have swept over the area."²⁰ These speculative appeals were made in many cases by fly-by-night operators who bought low, subdivided on paper, sold some lots quickly, and got out. Usually, in this earlier era of speculation the promoter had little or no investment in the land. His sales produced clear profits. The owner, however, was left with a piece of land with higher assessments, and only a few lots sold off. Often the end result was a tax sale. Then the ". . . white elephant became the burden of the city, county, or state, and the taxpayers were the losers."²¹

¹⁸Seward, Autobiography 315 (1877).

¹⁹Monchow, Seventy Years 1 (1939).

²⁰ibid.

²¹Horack & Nolan, Land Use Controls 204 (1955).

In the past, particularly in the Thirties, tax delinquency and foreclosure rates have often been staggering. These 1936 figures for Buffalo, New York, emphasize the results of speculation and premature subdivision: 92 per cent of the lots in recorded subdivisions were vacant, 45 per cent of assessed values were on vacant lots, 83 per cent of the vacant lots were tax delinquent, and 97 per cent of accumulated arrears, taxes, and special assessments were on vacant lots.²² A similar situation existed in Detroit,²³ and doubtless in many, many other cities in the United States.

Philip Hove's diary indicates the end result of the speculation of 1835. His entry for April 21, 1937 tells us that "The immense fortunes which we have heard so much about in the days of the speculation have melted away like the snows before our April sun."²⁴ Further,

. . . evidence of the pecuniary distress which pervades the community is to be found in the reduced price of stocks and unimproved real estate. . . . As to lots which have been the medium of enormous speculations . . . lots which cost last September \$480 a lot have been sold within a few days at \$50.²⁵

The result is inevitably the same, whether in terms of reduced prices for lots or in rows of vacant houses.

Twentieth Century Attitudes

We Americans have somewhat modified our traditional feelings about land speculation in recent years. It took a real boom and bust to alert us to the many dangers of unrestricted development. It is a fact that

²²Id. at 205.

²³Ibid.

²⁴Hove, supra note 16, at 140.

²⁵Ibid.

. . . subdivision controls were not thought of as a means of limiting the amount of development until the vast land speculations of the 1920's showed the folly and ruinous expense to local governments of unrestricted subdivision. In this decade, when zoning controls were being adopted, practically no control was exercised over the amount of land seized for development. In Florida enough land was subdivided to house the population of the entire United States. In Northern Westchester County in New York State and along the New Jersey Coast, thousands of twenty-foot lots were distributed by newspapers to new subscribers. The result was that vast quantities of land on the outskirts of every large town and city were roughly hewn up for development with jerry-built homes and without proper roads, water, schools and other city services. The wastage of land was appalling.²⁶

If it seems strange to the reader that small lots were given to new subscribers, there were even stranger promotional stunts. Cornick tells that during the boom of the 1920's the speculators ". . .relied on high pressure salesmanship and on devious devices to sell their lots. In one case, deeds were given away as premiums with boxes of soap."²⁷ It goes without saying that cheap land was thus dispensed in order to prime the pump.

The land so offered was of little or no value to start with.²⁸ In twenty-foot lots it was useless for building purposes, and, as one would expect, the lots showed a "high mortality rate as taxpayers,"²⁹ thereby adding to the financial load of the county in which it was located.

Another factor that added to the financial troubles of counties and municipalities was default of many kinds of bonds issued to aid development.

²⁶Delafons, supra note 2, at 25-26.

²⁷Cornick, supra note 1, at 168.

²⁸Ibid.

²⁹Ibid.

Bonds, whether railroad aid, irrigation, drainage district or special assessment, have all too often been issued in aid of the real estate speculator or promoter, so much so that a large portion of all municipal debt difficulties could be summed up under the caption 'real estate aid bond defaults'.³⁰

This problem is a very real one for many of our municipalities today. All too often one finds that a city has issued bonds and obligated itself unduly in order to provide services and facilities to new subdivisions. These are services and facilities that the developer, not the city, should have furnished.

Speculation leads to waste of a valuable resource. There is waste in taking land out of a productive use before it is ready for another; waste in tying up capital for long periods in an unproductive enterprise, with more in taxes, interest, and special assessments; waste in the division of land into lots that are too small, of poor design, or poorly located; waste in zoning too much for business use; and waste in replatting land prematurely subdivided. There are other wastes too: increased utility costs, increased maintenance costs, and increased overall governmental costs, all of which affect the community adversely.

America is beginning to mature, and as our cities have begun to deteriorate and their populations flee to the suburbs, as we begin to realize that the supply of land is not limitless, as the full effect of our past practices in the use of land become visible and even almost unbearable, we are beginning now to change our attitude toward regulation of land use. It is not a complete change in American attitude; rather, it is a change in the dominant pattern of thought. History indicates that though one concept is dominant in a society, it usually has an

³⁰Hillhouse, Municipal Bonds 67 (1936).

antithetical concept, held by a small minority, which seems dormant. In time, of course, the opposing view may gain the ascendancy. This is exactly what is happening now in America with reference to our ideas about land use.

Free Enterprise and Land Use Attitudes

Even though the majority view in the nineteenth and early twentieth centuries was strongly opposed to government control over any part of the economy, and even though majority thought during the first decades of the twentieth century opposed any governmental regulation of land use, there was a current of thought that favored regulation. And it is a point of view that has hoary precedent. The fact is that the government has exercised "continuous and often elaborate control" over many aspects of private development since the earliest colonial days.³¹

Despite ancient antecedents, the land use controls that do exist in this country today cannot be traced to an overwhelming preference for planning or the planned community.³² There is nothing idealistic or utopian about the controls we do have. Their origin is not in any theory of city planning, but in the "... common law of nuisance and in the public statutes regulating noxious industries."³³

The controls that we do possess have largely grown out of our desire to protect our property, not only from government interference

³¹Delafons, supra note 2, at 18.

³²Some communities were founded with the intention of planning their development, but these were often disturbed by later growths. Examples of these are Washington, D. C., Savannah, Ga., Madison, Wisc., Williamsburg, Va. and Annapolis, Maryland.

³³Delafons, supra note 2, at 17.

but from other private property as well. Our regulation of the location of certain uses and industries, in order to protect our property from possible damage, as in the case of gun powder storage, or from noxious odors, as in the case of a tanning yard, go back of American colonial experience at least to Roman law.³⁴ These regulations of land use were adopted one at a time over a long period of years. There was no drafting of a systematic theory or plan to control all land use; instead, regulations were made as changes and new developments required.

The "system" that we now have for regulating private development - zoning - is a product of the Twenties, the apex of free enterprise thought in this country. Zoning, which controls the uses a private individual may make of his land, cannot be understood without going back to discover the motives that led to the establishment of the system.

At first glance it seems incredible that a system for regulating private use of land could be accepted at the very height of the popularity of the free enterprise concept. But zoning was accepted, and accepted in the twenties. The extent of its popular acceptance is shown by the fact that in 1919, twenty cities in the United States had zoning ordinances, but in 1929, 973 cities had them.³⁵

Zoning was accepted by the public not because the public was in sympathy with governmental regulation, but because the property owners in this country wanted to be protected from each other. Zoning seemed a good, sound, conservative device to protect property by restricting locations and uses of land so as to protect property values.

³⁴ Rathkopf, Zoning and Planning I (3d ed. 1956).

³⁵ Delafons, supra note 2, at 18.

In the Sixties Americans may be ready for another kind of governmental control that will protect property owners and cities and taxpayers from economic loss. That control is subdivision regulation. It will not only protect us from economic loss, it will protect us from social waste as well. The American people must see that it is a tool like zoning, but that it is more important than zoning in rapidly developing areas because it can be utilized to set the pattern of development.

This writer has to agree with the student who said that "In theory, almost everyone (except the land speculator) stands to benefit from the introduction of zoning and subdivision control."³⁶ Many think this would be true in practice as well as in theory. The speculator would not benefit from such control, but the average developer would, because his development would possess an appeal that would attract purchasers.³⁷ So, if a developer wants to sell his houses and make a profit on his investment he owes it to himself to make his development attractive to potential purchasers. If the subdivider plans to remain in the development business in that area, he owes it to himself to make his developments as solid and sound, as well planned as he can, so that they will not rapidly deteriorate and depreciate.

The trend seems to be in the direction of more "professional" developers who, over a period of time, bring in several subdivisions. As these developers realize what good subdivisions mean to them personally, the quality of our development may improve. There can be no doubt that successful subdivisions are founded on intelligent planning

³⁶Id. at 82.

³⁷FHA, Planning Profitable Neighborhoods 3 (Tech. Bull. No. 7, 1939).

and the adoption of sound programs for controlling development.

Still, population continues to grow, existing housing deteriorates, and there has been for decades now a considerable demand for new subdivisions. This demand created a situation in which subdividers, lot owners, and speculators could, over extended periods, profit from the sale of lots whose value had increased. "This factor in turn created a widespread opposition to any type of control which would hamper the activities of those who engaged in the speculative enterprises connected with the conversion of raw acreage into urban lots."³⁸ Widespread opposition to control of speculative activity still exists and is responsible for much of the disorderly community growth in America.

³⁸Cornick, supra note 1, at 222.

CHAPTER III

DEVELOPERS

Some knowledge of the subdivision business and of subdividers is a prerequisite for understanding the problems encountered in attempting to provide the machinery for orderly community growth.

Subdivision is a term that covers a wide range of activity.

It may consist of the platting and sale of a single block in a city. On the other hand, there might be involved the planning of a very large parcel of land and the development of an entirely new section of a county, thereby carving out an entire community, containing, in addition to a residential section, facilities for schools, churches, shopping centers, and of course, necessary utility facilities.¹

The few earlier works on subdivisions speak in terms of raw lots,² but recent decades have witnessed a change in subdivision practices. Subdividing has changed over the last two decades, largely because the demand since the end of World War II has been primarily for houses, not for raw building lots, and because of the growth of the Federal Housing Administration, which made more widespread home ownership possible.

Large Scale Development

Most of the recent land development has been increasingly of the large scale variety. We now have developers, not just subdividers,

¹Yokley, Subdivisions I (1963).

²Cornick, Premature Subdivisions, passim (1938).

and these developers sell a complete package -- house, lot and often some of the larger appliances. "Certainly the large scale developer of suburban real-estate -- both residential and shopping center type -- has become a national phenomenon."³

The subdivider of raw land who sold building lots has been replaced by men who acquire large blocks of land, subdivide it into lots, make improvements, construct houses on those lots, partially furnish the houses, and attempt to sell the whole package.⁴ These men, sometimes in the real estate business and often housing contractors, are the merchant-builders who now dominate the subdivision scene. Figures show that these are the men who are having such an impact on development today. One study showed that of twenty subdividers interviewed, eight had built one subdivision, five had built two, five had built three, one had built ten, and one man had built twenty-three.⁵ This last developer, then, has had about as much influence on community development as the remaining nineteen put together.

Amateur developers

This study also indicates, however, that subdividers with little experience are still very much active in land development. These amateurs probably constitute a larger numerical group than the professional subdividers, but they do not account for the majority of housing units built.

³Kammerer, Farris, DeGrove & Clubok, The Urban Political Community 202 (1963).

⁴Clauson, Held & Stoddard, Land For The Future 34 (1960).

⁵Melli, "Subdivision Regulation in Wisconsin," 1953 Wis. L. Rev. 389, 433 (1953).

In considering what control should be expected over this business one must realize that subdivision is cyclical in nature, and, therefore, rather unsteady and unpredictable. The relative scarcity of long-term professional developers is understandable, given the nature of the business. In good times the business is very good; otherwise it is dormant, and a man must have other sources of income. So, subdivision is a sideline for many, and in economic downturns this developer reverts to his role as real estate man or as contractor.

Unfortunately, these amateurs engage in subdivision activity so infrequently that they bring very little experience and very little capital to invest in their operations. They are also most likely to lack understanding of the problems involved. There is no doubt that these people, due to their great numbers, can do and have done our communities a great deal of harm.⁶ The need to regulate them in order to protect the public interest is a very desperate one.

The Profit Motive

All subdividers want to make a profit. Indeed, they must make a profit or go out of business. Many of them seem to want to make an inordinately large profit, at anyone's expense except their own. In the absence of adequate subdivision regulations, many subdividers harkening back to the practices of the twenties, have acted in a fashion not calculated to promote the common weal - or their own long range good, of course. Adrian claims that where subdivision regulations are inadequate

⁶Id. at 432.

. . . ambitious land developers have subdivided far beyond the foreseeable needs of a community and have talked or oressured the governing body into furnishing utilities to an otherwise vacant subdivision. This, in effect, forces the taxpayers to subsidize speculation in real estate.

Land developers, like other people in business, aim to make money. No one can quarrel with that objective. It is unfortunate, though, that profit often turns out to be the overriding or exclusive consideration in development.

According to Lautner, the developers' ". . . primary motive in subdividing land is private profit, but the motive of the community, which sooner or later finds itself responsible for the subdivided land as a part of the whole machinery of the city, is public service."⁸ The necessity for coordination of these two desires is evident, but efforts in the direction of subordinating profit to the good of the community often meet considerable resistance and opposition, tough and vocal. The power and influence of real estate developers more often than not overshadows the interests of other less organized and less vocal groups, such as home owners and tax payers, for example, so that it is difficult to balance these two worthy but opposing motives.⁹

Industry Attitudes Toward Control

It is this writer's feeling, based on several years of actual contact with developers, that progressive land developers and home builders today realize the desirability and necessity of subdivision regulations. Whether the organized industry understands is open to

⁷Adrian, Governing Urban America 463 (1961).

⁸Lautner, Subdivision Regulations II (1941)

⁹Englebert, ed., The Nature and Control of Urban Dispersal 21 (1960).

question. It has been said that the "... organized industry reflects an appreciation for the desirability of social control to avoid economic waste and protect the ethical subdivider and the reputation of the industry from the irresponsible 'wildcat' subdivider."¹⁰ The organized industry is doubtless aware of some of the problems, but this writer doubts seriously that the organized industry really appreciates the need for social control. The industry and its spokesmen make statements to this effect, but their reaction when control affects what and where they want to build is something else again. Industry reaction to the so-called "snob zoning" is indicative of (1) their desire to make money and (2) their dislike of control.

Many developers have opposed "snob zoning," which calls for residential building lots of from one to five acres - or even ten acres - in a particular area of a city or county. The purpose of snob zoning is to preserve the appearance of open space, to achieve high-grade residential development, and to keep taxes down. This aim is to be accomplished by thus preventing a great influx of small home owners, with their demands for services and utilities, and especially schools. Despite the fact that this kind of zoning has been upheld in several states, such restrictions have been virorously opposed by developers and by property owners wishing to sell to developers.

Why do the developers oppose snob zoning? They oppose it simply because they would prefer to take the same land area, chop it up into lots and lots of little lots, build cheap houses, and make more money

¹⁰Max Weberly, Executive Director, Urban Land Institute, quoted in "An Analysis of Subdivision Control Regulations," 28 Ind. L. J. 544, 549 (1952-53).

(at least they see it this way), regardless of the consequences.¹¹

Practices of the Twenties

It is this writer's feeling that too many of today's subdividers have the same attitude that the subdividers of the Twenties had. The practices of the Twenties -- "The post-war orgy of uncontrolled subdivi-¹² sion" -- emphasize the problems we face today. During the boom of the Twenties the unfortunate results were not easily foreseen, and the same is true of the mistakes that are being made today.

The industry's practices of the booming Twenties illustrate just how recent their concern is. During that speculative period the results were not easily foreseen by the industry - and by hardly anyone else, either. The public apparently felt that developers brought progress. One writer eulogized the subdivider as ". . . the magician of modern times. . . truly the advance guard of civic progress. . . the unsung and unromantic hero of modern civilization."¹³ Many developers still share in this rather glowing assessment of themselves. The organized industry could help in eliminating much of the bad development and bad developers if it would. The industry, however, regardless of its official statements about how desirable regulation of subdivision is, remains reluctant and rather obdurate in its resistance to establishment and enforcement of many of the controls that are desirable.

¹¹Walker, "Land Use and Local Finance," Tax Policy 13 (1960).

¹²Englebert, *supra* note 9, at 34.

¹³Malbrough, "The Magician," The Economist 25 (1925).

The industry's real position

The organized industry may accept social control, but when social control ceased to be theoretical and general and became specific and prevented some developers from doing what they wanted to do, one of the industry spokesmen said: "We cannot stand by and allow snob zoning. . . arbitrary action. . . and unreasonable subdivision regulations to deprive citizens of the privilege of owning homes, regardless of size."¹⁴The speaker's "we" refers, of course, to those people who build homes, and his last few words constitute good, tailor-made appeal for support by an interest group. It is a strong interest group, one that can and does, by using such appeals, build much substandard housing.

This writer feels that it is up to the people of the community, not the builders, to determine what the housing needs of the people of that community are. This writer is not willing to trust the builders, judging them on past and present performance.

The developers' statements illustrate why we cannot trust their unrestricted judgment of what is best for the community. The Community Builders' Council has claimed, for example, that it is inequitable to force a developer to put sanitary sewers in his development,¹⁵ and that it is an "inequity" to require a developer to pay the cost of building an arterial highway through his project.¹⁶ This Council contends that the cost of improvements required by the municipality is usually too high and the city should pay street and utility installation costs, presumably so that the builder can make more profit.¹⁷ The Council seems

¹⁴Quoted in Englebert, supra note 9, at 61.

¹⁵Urban Land Institute, Community Builders Handbook 44-45 (1960).

¹⁶Ibid.

¹⁷Ibid. at 43.

generally opposed to developers' paying for almost any improvements.

One writer, avowedly very sympathetic to the builders,¹⁸ has said that "if it is true that taxes are substantially increased just because a plat of the area is on record, it may result in great hardship to the subdivider whose lots do not sell rapidly,"¹⁹ This comment, though not voiced by a builder, seems to typify the industry's attitude. The writer goes on to say that in such instances "Taxes are money down the drain."²⁰ In her great sympathy for the builders the writer apparently fails to understand the purpose in levying increased taxes on platted land. In the first place, such land is, or ought to be, worth more after platting, and should be so assessed. Secondly, and more importantly, increased taxation is aimed at preventing or at least slowing down premature development. Chances are that if the subdividers' lots do not sell fairly quickly he subdivided too soon, too far in advance of demand. Increased assessments and higher taxes are aimed at preventing exactly this.

The comments of Mr. J. C. Nichols, prominent developer of Kansas City, further illustrate the industry's attitude. Mr. Nichols, while saying on the one hand "Let us be sure we are not building future blighted or slum areas,"²¹ say, on the other hand, that in his own developments the blocks were too short, lots were too deep, many lots were too wide, some were too narrow (45'), there were too many odd shaped lots;²²

¹⁸Melll, supra note 5, at 445.

¹⁹Id. at 440

²⁰Ibid

²¹Urban Land Institute, Mistakes We Have Made in Community Development 7 (Tech. Bull. No. 1, 1945).

²²Id. at 3

he spent too much money on landscaping and trees and shrubs,²³ he dedicated too much land for school sites,²⁴ he built wider side walks and wider minor streets than necessary,²⁵ and was ". . . entirely too liberal in dedicating to our city wide parkways and boulevards through our properties. . . ." ²⁶ Mr. Nichols' comments sound like the regrets of a man who wished he had built less costly and less desirable developments.

Even if many subdividers are building with at least an occasional reference to the community good, there is still a major problem inherent in their developments. Reference is made to the knowledge and ability that the developer may or may not have. The question is not particularly the ability of most builders to actually construct a house, though many examples of their efforts might lead one to raise that question. Most builders can construct a house, but whether they are capable of building a neighborhood or a community is another and vitally important question.

Developing Residential Trends

It has been said that ". . . the decisions that determine residential trends are made by millions of relatively uninformed persons, largely on an emotional basis."²⁷ This writer disagrees, in part. The author of those words was referring to prospective home buyers, who are many and possibly uninformed. Those who determine residential trends may be uninformed, all right, but they are not the prospective buyers; they are the developers.

²³Id. at 4.

²⁴Id. at 5.

²⁵Id. at 2.

²⁶Id. at 3.

²⁷Walker, supra note 11, at 14.

Who really sets the trends? Do developers build houses in the suburbs because prospective house buyers want to locate in the suburbs, complete with suburban atmosphere -- and school, transportation, and services problems as well? Or do developers build houses where land is available and cheap, thereby setting the trend? The answer is clear. Public values are ". . . really determined by realtors and contractors who find that the fringe areas are the only places where they can assemble relatively large quantities of cheap land on which to build low-cost homes." 28

As Martin stated,

To the real estate promoter the fringe is an area to be exploited, with the planning and profits of the conservative investor threatened by the spreading blight of the land shark's wildcat subdividing, jerry-built homes, and the inconsistent building and occupancy codes.²⁹

And exploited the fringe is. Assuming that it is true that the flight to the suburbs is due at least in part to a rather widely held desire to live in lower density neighborhoods,³⁰ why then do developers insist on tiny lots? Why are so many of the new subdivisions laid out on a grid pattern, with no concern for topography? It has been said that "The use of grid patterns. . . has sometimes increased costs."³¹ Use of a grid pattern almost always increases costs, either because the streets as they are laid out do not fit the contour of the land, or because the houses in the development are a string of look-alikes, each similarly placed on its small lot, row upon row, and worth less than an esthetically pleasing subdivision. Unenlightened developers are responsible for this kind of subdivision.

²⁸Engelbert, supra note 9, at 18.

²⁹Martin, The Rural - Urban Fringe I (1953).

³⁰Clauson, Held & Stoddard, supra note 4, at 55.

³¹Engelbert, supra note 9, at 77.

The unenlightened developer

The unenlightened developer is no stranger to anyone who has recently shopped for a new house. This is the builder who has poor traffic plans in his houses, poor arrangement of rooms and functions, poor lighting, cheap materials. These are some of the signs of a cheap house, put up by a man who may not know any better, a builder who is interested in selling houses, not in developing a good, solid neighborhood or community.

It is slightly ironic that the developers who desire to take shortcuts, use cheap material, and build low-cost houses do not know that their reliance on traditional grid patterns and small size lots often costs them money instead of helping them to make more profit, as they erroneously assume.

The FHA's Planning Profitable Neighborhoods³² is full of illustrations of original subdivision plats submitted to FHA and FHA's "suggested revised plans."³³ Many of these plats show a great waste of land; lots are of an undesirable shape and location; topography is not considered when streets are laid out and houses placed; often there are too many streets; and usually there is no consideration at all of uncontrolled adjoining property and how it affects the streets or lots or house placement in the development. FHA's revisions are made ". . . on the basis of greater economy in street and road construction, reduced cost of utilities, and desirable lot sizes that would increase their sales

³²FHA Tech. Bull. No. 7 (1939).

³³Id. at 20-33.

value."³⁴ FHA has found that larger lots require fewer streets and fewer utility lines, thereby saving the developer money, and in addition the lots and houses are more desirable, more valuable, and more easily marketable.

Sometimes accessibility, topography, climate and fertility of the land, population growth, and other factors have been taken into consideration and decent subdivisions have been built. Unfortunately, some subdividers do not always choose their sites so wisely, and development by unenlightened developers has plagued the community.³⁵

Land waste is an important factor in this disorderly, disjointed development. It seems that

. . . we have permitted valuable agricultural land to be 'chewed up' into ill-conceived districts which either have not developed into residential areas or have developed so badly that they have deterred future construction within the reach of their baneful influence.³⁶

Zoning and subdivision regulations have been unable to withstand the pressures of the market and the onslaughts of the land speculator and the merchant-builder.³⁷

Shabby housing is another product of the inadequate developer's art. Construction of a house in the not too distant past was a task for real craftsmen. The job took some time, and the result was a fine piece of workmanship -- and it was expensive. Mass production has been applied to the housing industry in the last few years. One would hope that mass production would produce less expensive but well constructed houses, more of them, and in less time. The result, though, is that

³⁴ Id. at 20.

³⁵ Cornick, supra note 2, at 3.

³⁶ Horack & Nolan, Land Use Controls 204 (1955).

³⁷ HHFA, Urban Expansion 139 (1963).

... builders and developers [produced] a product... which had little or none of the characteristics of efficiency, economy, and over-all serviceability for the community over a long period of time, even though most of this production was financed over a period of twenty to thirty years.³⁸

There can be no doubt that there have been a great number of poorly designed and shoddily built developments in recent times, and

"... there are still too many developers working on the hit-and-run basis, clearing out before public opinion can catch up with them."³⁹

Substandard improvements have been foisted off on the home-hungry public by the irresponsible developer.

In many cases, makeshift services were provided which had no long term feasibility of successful operation, and these were sold to the unsuspecting public on the basis of permanent improvements. The home owner in the dislocated subdivision is thereby faced with many problems which he did not anticipate when he bought his home. When these difficulties arise he is not able to question the in-and-out builder who built an uneconomic community.⁴⁰

The homeowner cannot question the builder because he has picked up his money and moved on. Even if the builder has not moved on it would be extremely difficult to get any satisfaction from him, since he has no further connection with the houses. He has been paid, and any problems are someone else's concern.

In sum; too many of our developers are unenlightened, short sighted, and perhaps greedy. Whatever the reasons, large numbers of developers fail to see that high quality developments will be better for them and for the community as a whole, including the house buyers and the lending agencies and the mortgage guaranteeing agencies.

³⁸Engelbert, supra note 9, at 3.

³⁹O'Harrow, supra note 37, at 139.

⁴⁰Engelbert, supra note 9, at 3.

The subdivider is a "city architect." He is, to a great extent, responsible for a municipality's future, because the developer establishes "... a land use pattern that will endure for years through the creation and installation of new streets, new utilities, new parks and other open spaces."⁴¹ Since this is the case, and since each individual subdivider can have such tremendous impact on a city's future, the development of land should properly and necessarily be guided by the municipality, through its exercise of the police power or any other power that it can properly use to guide the community in orderly development.

Perhaps it is fortunate that the large scale developer is growing in numbers and importance. These are the people who develop an area completely and then sell the finished product. This kind of developer may be a contractor who finds that this is the best way to sell his houses, or he may be a real estate man who has found that people no longer want to buy bare lots but want ready-built homes -- in some cases furnished with stoves, refrigerators, washers, and dryers. This kind of development has wrought a great change in the entire subdivision picture, particularly in populous areas and in areas where there is a pressing need for housing. As housing costs have risen many people have favored mass-produced houses because of the savings that result from large-scale operations. Too, this kind of development is favored by FHA because it assures that an area will be completely built up, which tends to stabilize property values. ⁴²

⁴¹Yokley, supra note 1, at 24.

⁴²Melll, supra note 5, at 432-433.

The large scale developer has or can get sufficient capital, so he does not object to small fees, such as survey and plat fees, or to some greater expense, such as drainage, sewerage, and grading and surfacing streets. In fact, the scale of his operation often means that he will have to cooperate with city officials and is, therefore, willing to comply with most "reasonable" requests.

So, in one respect, at least, the change in subdividing lends itself to greater control. It is easier to regulate a man who completely develops a subdivision and stays around to develop others than it is to regulate a man who sells some lots and then is gone. On the other hand, the merchant-builder may be less amenable to regulation if his operation grows to such a size that he is an economic factor to be reckoned with and can muster considerable support for his cause when he opposes regulation.

Regardless of the subdividers' tremendous impact on the future, the fact is that "... the initiative for deciding the rate and location of development must remain with the developer."⁴³ Whether this initiative should remain permanently with the developer or not is a pertinent question for cities and counties and regions to consider at this time. Still, this is where the initiative has come from in the past, and the results have not always been satisfactory. All too often and too regularly man's desire to speculate, to make a quick profit on a piece of land, has provided this initiative.

⁴³Delafons, Land Use Controls In the United States 65 (1962).

CHAPTER IV
DEVELOPMENTS

In Mansfield & Swett v. Town of West Orange,¹ the court commented on the extent and consequences of unplanned development:

We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety, and prosperity of our citizens that are well-nigh insurmountable because of the prohibitive corrective cost.²

This planless growth is, in large part, the result of no regulation, or poor regulation, or inadequate enforcement of subdivision regulations.

In the absence of adequate subdivision regulations one is likely to find low grade subdivisions, premature and excessive subdivision, partial developments, and scattered subdivisions. Subdivisions that are improperly located, with streets and housing that do not conform to topography, induce slums³ and present other problems. Subdivision regulations are important; they are necessary to prevent this kind of development, of course, but more importantly, once the raw land is subdivided the permanent character of the community is established. It is established by subdividers, who enter into this activity for profit, not out of desire to protect the public interest by developing a well-designed subdivision.

¹120 N.J.L. 145, 198 A. 2d 225 (1938).

²198 A. 2d 225, 230.

³Ford, Slums and Housing 444 (1936).

There is more involved in the subdivision of land than just a sale of lots by one man to another, because subdividers are dealing in the permanent assets of a community when they break up large tracts into lots and provide such improvements as streets, water, and sewage disposal facilities. In this activity the subdivider determines the main outlines and character of a part of the community, and over a period of time a number of private real estate developers shape, piecemeal, a large part of our growing cities. Often these independent operations are poorly designed, lacking in improvements, and coordinated neither with surrounding developments nor with the layout of the city.⁴

Justification for Regulation

The single most important justification for subdivision regulation lies in the welfare of the community. Subdivision regulation can protect the community interest. The community has a legitimate interest in any new subdivision, whether within or without the corporate limits, for a number of reasons. Subdivision regulations can be an effective instrument of land use control by the community as it attempts to plan for the future and for the desired services and uses and functions of the future.

The original layout of an area will determine its character for an indefinite length of time. Once an area becomes built up, the cost of change would be prohibitive even though the problems and the desirability of change are evident. The subdivider, then, whether conscious

⁴Haar, Land Use Planning 347 (1959).

of it or not, sets the pattern for the future community, and the multitude of independent subdividers have a heavy responsibility for the way in which people of a community will work and live and play in future generations.

Many of our communities most perplexing problems today are the result of haphazard development. Slums, lack of services, high taxes and special assessments for improvements, high maintenance costs, cramped school facilities and the ever-present traffic congestion can be traced right back to the way in which our communities have been developed.

It should be obvious that a practical and economical method of preventing these problems must be provided so that the original subdivision of raw land into building lots can be suited to the needs of the developing community. Subdivision regulations can provide this control, but the adoption and utilization of subdivision regulations to achieve this control in the public interest, has lagged behind our interest in protecting the rights of the speculator in lands and houses.

The Participants ⁵

The developer. - A developer enters into subdivision activity because he is primarily concerned with deriving a profit through the performance of certain important functions.

There is a wide range in the activities of developers. Some

⁵This section is based generally on discussion in U. S. Housing and Home Finance Agency, Suggested Subdivision Regulations (1952); and Mell, "Subdivision Control in Wisconsin," 1953 Wis. L. Rev. 389 (1953).

merely process and market land, buying wholesale and selling retail, with nothing much added in the process. Others develop with great care, install improvements, and build solid houses, or attach deed restrictions in sale of lots to require quality construction.

The residential developer provides a service by making property available in the form required for urban settlement. The developer benefits just because an urban area is there. Most subdivisions derive an important part of their value and marketability because of their proximity to an urban center. The benefits of operating and locating in an urban area outweigh the price the subdivider must pay in submitting to necessary controls.⁶

Another major benefit conferred on the developer is the promise of dependable government and the availability of its services.

If buyers were not assured of schools, streets, hospitals, sewers, water, garbage disposal, police and fire protection, libraries, parks and recreational facilities. . . sales and values would be seriously impaired.⁷

It must be pointed out that although one subdivider may plan a very fine development without any community regulation, it does not follow that all would do so. Subdivision regulation protects the high-level developer from the adverse effects of having his subdivision surrounded by undesirable areas. Low-grade subdivisions brought in by less substantial developers and speculators lower the value of better developments nearby.

⁶Bair, Bair Facts 46 (1960).

⁷Id. at 46-47.

The home buyer. - Regulation of new real estate developments protects the lot purchaser and the home buyer in a very real way. Much of the buyer's protection is actually incidental to protecting the community interest, because any regulation aimed at achieving orderly land development will benefit individuals who invest in the new subdivisions.

How is the buyer protected? He benefits if the city discourages subdivisions that are too far removed from city services and protections, because extension of these services can cost him money, and, in general, a lot or a house in one of these distant subdivisions would be a poor investment for the average home buyer. The potential buyer is protected if the city discourages or prevents low grade subdivisions, premature subdivisions, partial development, and excessive subdividing.

Other services rendered the home buyer by community subdivision control include (1) elimination of costly boundary disputes, precluded by official review of a survey and plat of the planned development area; (2) the potential buyer will have some idea of what the undeveloped area will be like after subdivision, because he can scrutinize the plat, which will show what the subdivider's plans are for streets, lot sizes, open spaces, reserved areas (for schools, for example), and recreational areas; and (3) the buyer is also protected - in the majority of instances - from changes in that plan, since the majority rule is that the sale of lots by reference to a plat showing streets and public places estops the subdivider from later changing

those streets and public places. There is also a possibility that sale of lots by reference to a plat will estop the subdivider from later lowering the size of the lots shown on that plat. The majority rule is now contra, but here is one point on which the courts must change. They must express a more enlightened view, one calculated to safeguard the community and the buyer. This writer feels that the change is bound to come as the courts realize the importance of all aspects of subdivision control.

The purchase of a home is surely a major investment. For the average American it is probably the largest and most important single purchase he will make in life. If the community can protect itself and protect its home buyers' investment it surely ought to be able to do so.

The community can protect the home buyers' investment, which is amortized over a long period of time, by requiring initially a good subdivision layout so that the new development will maintain its character and its value over the long run. Some so-called esthetic considerations are important here. Such things as location of residential subdivisions away from areas which are noisy, dirty, congested, or otherwise undesirable, and requirement of a set proportion of curbed streets and planting strips along major traffic arteries are not esthetic matters only. They prevent deterioration of the area and preserve property values. These esthetic considerations, not yet accepted by the courts as a basis for regulation, are probably the single best protection the home buyer has.

The mortgage lender. - The mortgage lender also has an interest in the subdivision, and protecting the investment of the home buyer also protects the mortgage lender. The great interest shown by FHA in the original planning of subdivisions in which it may insure mortgages is ample evidence of the fact that the original layout of the subdivision affects the investment of the mortgage lender.

The governmental bodies. - The future services that new developments will likely expect must be considered. Society has become more complex, and in the past fifty years people have asked their governments for new services and for increased levels of performance in the older services. There is no reason to expect the trend of increased governmental activities and services to be reversed.

We can conclude that we must expect the citizenry to continue to call on their governments for more and more services. It is the responsibility of the local governmental body or bodies involved to provide the services expected in new areas that develop. Further, these bodies must find the means to pay for the provision of various services. The governmental body should consider each proposed new subdivision in relation to the services the residents will expect and demand, the certainty of revenues from the subdivision, and other factors which should demonstrate the financial burdens involved. Government should seek ways to assure that, as far as original facilities are concerned, new subdivisions pay their own way into the urban circle.

Local government does not profit financially from new residential development. It faces a struggle in meeting the cost of services and maintenance. Government is not in the small circle to which the profits of growth accrue. Instead, as cities grow, per capita costs of government increase. Local government is in a poor position to subsidize growth which increases its costs.⁸

There are safety considerations to keep in mind. New areas will have to have police and fire protection. In most cases the residents will expect the city to furnish these, either immediately or a little later. Since this is the case the city ought to have an opportunity to make sure that the streets are wide enough to accommodate the fire-fighting equipment. The city ought also to be able to demand lots of a sufficient size to reduce fire hazards. The city should be able to check the layout of a proposed new subdivision for traffic control capabilities and possible parking problems. The streets should be adequate for modern traffic. Main thoroughfares should link with other main arteries and should be at least as wide as existing ones. There should not be too many streets converging at one intersection, and intersections should be at right angles. There should be adequate off-street parking for commercial and industrial areas, and there should be enough play space to enable the children to play safely, away from streets. The city, when confronted with a proposal for development, ought to be able to check on these matters and make certain requirements. After all, it is the city that will be affected by this development.

⁸ Ibid.

Health is an important consideration for the community officials when a new subdivision goes in. The governing unit will want to insure an adequate sewage disposal system. An adequate, safe water supply is essential. Proper drainage - to make certain that basements are not wet or houses not flooded - is a must. If the area is not to be served with public sewers for awhile, the city will have to be sure that lots are of a sufficient size to allow private disposal of waste without creating a health hazard, and so arranged that, later, easy sewer hook-up would be possible.

Again, the fiscal considerations involved in a new development are of great concern and must be emphasized. A community cannot ignore the cost of providing services to new subdivisions. This is particularly important in these days of shrinking revenue sources, inadequate revenue, and demands for increased expenditures by the local governments.

Is it feasible to extend services to the new subdivision? Will it be economical to extend those services? Is the development so far away from the city that extension of services would be unreasonable? The city must ask these questions. And, if the answers are unfavorable to the development in question, the city should have the power either to prohibit that development or to make the developer bear the costs.

The community must also consider each new development in terms of what additional tax revenues it will provide. Blighted areas do not provide a very high tax return. These blighted areas are one of the biggest problems facing cities today, because they are unable to pay their way. Cost of services furnished by the community -- fire and

police protection, schools, recreation facilities, sewage disposal, street repairs -- exceeds the revenue obtained from those areas, and this results in a higher tax rate for those in more desirable, better preserved neighborhoods. It is easy to see that it would be better for the community to prevent these blighted areas than to have to attempt to rehabilitate them, at the cost of much money and effort. They can be prevented. It would be a large step forward if the community had the authority to insist on a favorable layout of the development initially.

When subdivisions are scattered far from available community services, such as water and sewers, fire and police protection, public transportation, and schools, the cost of providing these services is high, often exorbitant. The community should discourage this dispersal, when it means great expense to the city, by asking, at the appropriate time, whether this particular area should be subdivided and built upon at that time.

The city is justified in questioning the wisdom of such a development because subdivisions which are not within reasonable reach of the desired services will be less desirable places to live, will not attract buyers, and will tax the resources of the community in attempting to furnish the services wanted. If the city is realistic and forces the subdivider to pay for extension of services when an unreasonable distance is involved, the development will be less desirable, for the price of lots will be forced up and they may not sell so well. The crucial point is that the subdivider would know that if prices were

thus forced up and the lots did not sell he would be saddled with the cost of paying for useless improvements. This might tend to make the would-be divider give his project further thought.

The general public. - The taxpayers' interest is much the same as that of the governmental unit which he finances. The taxpayer has trouble enough already.

He sees his city as a place of crowded streets and crowded schools, of inadequate parks and vanishing parking, of struggle against obsolescence and mounting costs, of increasing demands for services by the population already there. And he knows that one way or another, he is going to have to pay the bill.⁹

He hopes for improved quality and greater economy in the city's services. The taxpayer, like his government, does not benefit noticeably from mere quantitative growth.

Unguided Development

Some cities now have procedures for planning and implementation of their plans through zoning and subdivision regulation, but these, in great part, were adopted long after the need for them arose. Today the principal growth of cities occurs on their periphery, and it is here that planning and all the devices for plan implementation are most urgently needed. Unfortunately, it is true that subdivision regulation on the fringe of the cities and in their outlying areas is almost always inadequate and frequently even entirely absent.

In the early years of development, the suburbs suffer from several things that can lead to blight. Premature subdividers are

⁹Ibid.

all too often not sufficiently controlled in the core city itself, and in suburbs -- particularly in unincorporated areas -- they may not be regulated at all. Irresponsible subdividers cause erratic and inefficient use of land. The outer fringe, which becomes an inner part of the city, is the area where land is divided and sold without the installation of improvements and where jerry-built houses are built or bought.¹⁰ In a few years extensive subdividing and building will make this area an integral part of the core city. Then the new homes will be interspersed with flimsy, dilapidated shacks and non-conforming buildings, due to the belated adoption of zoning ordinances and subdivision control ordinances. It may come as a surprise to find that "... today, in quite a number of metropolitan areas, there are a greater percentage of substandard and dilapidated homes in the suburb than in the core city."¹¹ There are exceptional situations around the country, but

... the major problem remains - chaotic land usage until the area becomes quite heavily populated and then a belated attempt to prevent the building of any more individual shacks. But by this time the opportunity for maximum efficiency of land use is probably gone forever.¹²

Greater awareness of the problem is needed, along with a willingness to prevent problems, rather than just to attempt to cure existing unfavorable conditions.

In several areas there have been efforts toward establishing metropolitan planning, which is planning that encompasses a number of governments and governmental jurisdictions, but in many instances this

¹⁰Adrian, Governing Urban America 465 (1961).

¹¹Ibid.

¹²Ibid. at 466.

has been aimed at solving certain specific and immediately vexing problems, such as highway locations and mass transportation, for example. In general, it has been almost impossible to find a politically expedient method of representing the many communities of an area in a planning organization with any real power to enforce control of land use.¹³ And even where such authority is legally provided, it may not be utilized.¹⁴ It is exceedingly difficult to plan on a metropolitan or urban area or regional basis, and it has been almost impossible, thus far, to get broad-scope authority over subdivision activity. How can we implement if we cannot agree on what to implement?

It is possible to have extraterritorial subdivision regulation, and this tool, along with a city's power as proprietor of the various utilities, affords the city a method for control of land subdivision. When a city does not exert control the results are unfortunate.

The Results of Inadequate Control

In the absence of adequate controls for land subdivision one is likely to find low-grade subdivisions, premature and excessive subdivisions, partial developments, and scattered subdivisions.

Low grade subdivisions

Low grade subdivisions are developments that are not well located, based on a variety of factors; that are designed or constructed

¹³ Ibid.

¹⁴ The situation in Tennessee provides a good example. Metropolitan Commissions are empowered by statute (Tenn. Code Anno. 13-711) to act as regional commissions for the whole county. This authority has not been widely utilized.

in an inferior fashion, or built of inferior materials; that feature houses that are too small and too close together; or that have inadequate physical improvements, few improvements, or no improvement at all.

A really poor development would suffer from several of these faults, but two of these combined -- substandard construction and inadequate physical improvement -- can spell ruin and blight for the development. In fact, the latter weakness is almost invariably a harbinger of future blight for that area. Students of the problem agree that the ". . . relationship between the physical improvements, represented by sanitary sewers, water, electricity, gas, and storm sewer facilities, and the development of slums in areas of such high density as the urban residential district cannot be doubted."¹⁵

The causes of slums, of course, are many and varied, and among them are such factors as the quality of the land and the development of surrounding areas. Many cities have slums at the edges of swamps, in poorly drained flatlands, in hollows, on hillsides where streets and houses were not made to conform to the topography of the area, and in areas close to industrial zones, which definitely makes the area less desirable for residential use. In this latter case, such land is clearly better suited for industrial uses. If it is divided for residential purposes, ". . . it seldom becomes fully developed and often develops into a slum area. . ." ¹⁶

¹⁵"An Analysis of Subdivision Control Legislation," 28 Ind. E. J. 544, 545 (1952-53).

¹⁶Ford, Slums and Housing 44 (1936).

Another factor that indicates a substandard development is poor design. Narrow streets, jogs, dead ends, and streets that do not join other public ways in adjacent developed areas become very premanent, and only rarely and at great expense can any changes be made.¹⁷ Poorly designed streets will surely incline a development in the direction of deterioration and decay. Poor lot orientation, failure to utilize the topographic features properly, the use of pure grid layouts instead of a layout better suited to the area, and drainage systems that work improperly because of faulty design, problems caused by street layout or ignoring the topography are all design problems that exact their toll. To sum up, ". . . slum-inducing conditions arise from physical factors involving the instant and surrounding land, and from the need for improvements upon the land. . . ."¹⁸

Improvements in subdivisions are of major concern. If subdivision regulations are inadequate or nonexistent in their requirements on this point, and if the developer is not required to perform such functions as grading and paving streets and installing the minimum facilities necessary to convert raw land into building sites, he can sell lots after doing nothing more than staking out "paper" streets and perhaps erecting a few street signs.¹⁹

This kind of operation is itself detrimental in its effect on all concerned, but it must be realized that the effects are not confined to that one development. Such a development often, indeed usually, impairs

¹⁷International City Managers Association, Local Planning Administration 347 (3d ed. 1959).

¹⁸An Analysis of Subdivision Control Legislation," 28 Ind. L. J. 544, 546 (1952-53).

¹⁹ICMA, supra note 17, at 346.

or destroys the possibility for satisfactory use of adjacent land. It is not likely that contiguous land will be developed on a high plane. The blight spreads, with resultant financial loss to property owners and to the community.

Premature and excessive subdivision

One of the primary objectives of public policy in the subdivision of land should be discouragement of premature and/or excessive subdivisions.²⁰

There has been a trend toward suburban living over the past three decades, but this trend is due to factors other than a shortage of land for residential building within the boundaries of cities. The fact is that many major cities in this country contain more vacant lots than can be used for building purposes ". . . in a number of generations."²¹ The existence of great numbers of vacant lots is the result of premature and excessive subdivision. In the Chicago area in 1939 there were enough lots for 15,000,000 people, which was more than the total population of both Illinois and Indiana.²² The situation in Detroit in 1938 was similar.²³ In Buffalo in 1936, 92 per cent of the lots in recorded subdivisions were vacant.²⁴ In 1930 there were 175,000 vacant

²⁰Premature or excessive subdivision is defined as the subdivision of land that occurs well in advance of demand, usually triggered by a speculative fervor. Such subdivisions are generally of poor quality and of inferior design, with little or no physical improvements made on the land.

²¹Webster, Urban Planning and Municipal Policy 542 (1958).

²²Monchow, Seventy Years 1 (1939).

²³Michigan Planning Commission, A Study of Subdivision Development in the Detroit Metropolitan Area 31 (1938).

²⁴Horack & Nolan, Land Use Controls 205 (1955).

lots in Cleveland, and in Los Angeles there were enough recorded vacant lots to accommodate an 85 per cent population increase.²⁵ These figures are somewhat dated, and it is true that the population has grown, but the population growth has by no means kept pace with the excessive subdividing of land.

In the past several years there has been a real boom in the sale of land throughout the United States, and much of the interest in this has been purely speculative. Overbuilding and overbuying of houses has occurred in various parts of the country. One observer in Florida indicated that ". . . In subdivision after subdivision, I saw neat, attractive, perfectly useful homes standing empty in rows. . ."²⁶ The same writer pointed out that ghost streets exist in such cities as Tampa, Miami, and St. Petersburg in Florida; Shreveport, Louisiana; and Midland and Odessa, Texas.²⁷

The foreclosure rate indicates that houses are no longer scarce in most cities and that inflation in houses has slowed. With supply and demand roughly balanced in the housing market, developers, builders, mortgage lenders, and real estate brokers are forced to scramble for business. "This has led to extreme, sometimes fraudulent selling techniques."²⁸

The "Florida Foreclosure Fiasco" was caused by home builders who were busy selling houses to families who couldn't afford them.²⁹

²⁵²⁸ Ind. L.J. 544, 546.

²⁶ Tofler, "New Pitfalls For Home Buyers," Redbook, October, 1962, p. 65.

²⁷ Id. at 115.

²⁸ Id. at 152.

²⁹ Ibid.

There are several "gimmicks" to accomplish this end. Sometimes down-payments are slashed, illegally. Often the builder lends the buyer money for a down payment. FHA frowns on this practice. On occasion the builder will buy the buyers' furniture at an inflated price. Or a buyers' appliances, which are encumbered, will be put up as cash by the buyer.³⁰ Sometimes a prospective mortgage will falsify a prospective buyers' financial information, without his knowledge, so as to qualify for a loan. All these tricks are designed to evade requirements that should operate to prevent a person's buying a home he cannot afford. And all will get the seller in serious trouble with the FHA.

The foundation of the problem in Florida was laid

. . . two, three, and four years ago, when the affected subdivisions were first being built. The situation was aggravated by over-optimistic estimates of the potential market, with builders putting up too many new units at a time when the pace should have slackened.³¹

This observation points up the dire need for controls over timing and location of subdivisions.

Speculation has been encouraged. All advertising media have been utilized to extol the virtues of land speculation. Would-be purchasers are "allowed" to buy land -- of all kinds -- on very easy terms and are assured that the land will increase in value, so that they will be sure to make a large profit on their investment. Often there is not profit, only disappointment and financial loss, because excessive subdivision breeds speculation which produces further premature development.

³⁰ Ibid.

³¹ Id. at 155.

As an example of the misrepresentation that has occurred, the following story is most informative:

Three Miami men were indicted in Phoenix, Arizona, today on mail fraud charges stemming from mail-order sales of Arizona land they advertised as developed, 'king-sized western estates' near Lake Mead. Attorney General Robert F. Kennedy said most of the property is, in fact, totally undeveloped, desert range land, forty-eight miles from Lake Mead. . . . According to the indictment they sold property to at least 3,000 persons through mail order advertising. The advertisements described the land as 'developed' and 'livable now,' fraudulently implying that drinking water, power lines and telephone lines existed on the property.³²

Later on, according to the Justice Department, these defendants did buy a plat of 241 lots with utilities. Their initial holding, however, consisted of 5,000 lots without utilities.³³ It seems a pity that the penalty for such is only a \$1,000 fine and/or five years imprisonment.

Individuals who purchase lots for speculative purposes often lose money because they do not need the lots, and usually no one else wants them. The purchaser ends up paying taxes on land that was not worth what he paid for it and which he cannot market. "Experience shows that loss to individual investors is almost inevitable if the amount of subdivided land exceeds all foreseeable requirements for building sites."³⁴

The consensus seems to be that most bona fide developers deplore excessive and premature subdivision of land. They know that it confuses and upsets true land values, demoralizes the market for homesites, takes land out of productive use, unsettles the tax rate, produces fire hazards,

³²U. S. Dep't of Justice, News Release, March 14, 1963.

³³Ibid.

³⁴Despain, "Excessive Land Subdivision" 27 The County Officer 402 (September, 1962).

adversely affects surrounding land, retards or prevents development when land is ready, and increases the tax burden on the community.³⁵ The waste of public and private resources as a consequence of excessive subdivision is harmful to every community in which it occurs.

Excessive subdivision causes the community to lose economically. First, the community loses because productive land may be taken out of use and held vacant for many years. Then the community loses again because land speculatively held and unused ". . . does not long continue to yield taxes."³⁶ As a general rule, the land in premature and excessive developments is the first in a community to become tax delinquent, especially in the event of a slowdown in speculative fever or in case of an economic recession.

In fact, the community loses financially in a number of ways. It costs to assess the land; it costs to collect the taxes; the taxes are often delinquent; and finally, an increase in city taxes may occur, because if the city finances improvements for the premature subdivision through special assessment bonds, and the lots remain vacant, all the taxpayers of the city are forced ultimately to pay the bill.³⁷

If excessive or premature subdivision are rarely ever built up, why not just reassemble the vacant lands for other uses, or replat for residential subdivision? It is extremely difficult to reassemble for other uses or to replat into attractive lots and blocks because the original plat established so many small lots or tracts, and ". . . land

³⁵Cornick, Premature Subdivision (1938) is an excellent treatise on the consequences of premature development.

³⁶Despain, supra note 34, at 402.

³⁷Cornick, supra note 35, at 290.

once subdivided is often so difficult to reassemble and replat that the areas stay unproductive and unused for several decades,"³⁸

Partial development

A sad consequence of excessive subdivision of land is that frequently it is only partially developed. Misfortune befalls those few who actually build homes in such developments. "Only on rare occasions does a prematurely subdivided area ever build up completely," and "Almost all of them eventually end up in bankruptcy court,"³⁹

Sometimes these largely vacant subdivisions will have some limited improvements, but they are seldom equipped with sufficient utilities. Everyone has seen such a development at one time or another: the once-grand entrances, not so grand now; the faded and fallen street signs; the crumpled and broken streets; the scattered, forlorn-looking little houses. It is a grim picture of unfounded optimism that never came to fruition. Overgrown by weeds, these developments stand idle and useless while development moves in another direction and bypasses them.

These partially developed subdivisions exist in most of the states today. Their existence is a particular problem in Florida, where they still constitute a plague, due largely to the sheer number of them and the difficulty involved in replatting or reassembling for other uses.

The end result of partially developed subdivisions is a loss to the developer, a loss to luckless purchasers of lots or houses, and a loss to the community. Land is taken out of a productive use only to lay idle, with consequent loss of revenue to the local government.

³⁸Despain, supra note 34, at 402.

³⁹Ibid.

The loss of revenue is sorely felt because these partial developments burden local governments with high costs. Installation costs for utilities and improvements are high and are usually a dead loss because the developer does not sell enough lots or houses to cover those costs. Then if the city maintains utilities service the costs are high because it is more expensive to maintain widely spaced equipment, lines, streets, and so on.

Scattered subdivisions

One concomitant of premature and excessive subdivisions is partial development. Another is scattered subdivisions. Scattered developments seldom if ever pay their own way, again because of the high cost of providing utilities and/or other services, and because the scattered subdivision is likely to be only partially developed.⁴⁰ Even if fully built up, however, the revenue it produces for the city never matches the city's costs for services. A financial burden is, therefore, imposed on other land and other taxpayers to make up the difference between costs and revenues in the scattered subdivisions. Costs usually far exceed revenues in developments of this kind, largely because of the distance factor, but the average person is not cognizant of this fact, and often any one who attempts to prevent excessive development of land is put in the unenviable position of "blocking progress."

Sound planning should encourage building on available lots within the cities, where essential services are already available.

⁴⁰ Ibid.

Residential development should be encouraged to expand outward from established cities in an orderly way, rather than haphazardly. Scattered subdivisions, too far from essential services to be economically feasible, should be discouraged or prevented.

Unregulated subdivision is responsible for an excessive supply of lots, threatens economic stability, and may well result in future slums. Unsold lots result in delinquent taxes, foreclosure of mortgages, and confused titles. The ultimate result is depreciated property and increased costs to taxpayers.⁴¹

Preventing Unsound Development

How to prevent poor and unnecessary subdivisions is a most difficult problem in planning for the orderly future growth of our communities, but one for which a solution must be found. Solving the problems created by substandard, premature, excessive, partial, and scattered subdivisions is difficult and costly. Prevention of these problems would be far more desirable. However, the problem has not been generally recognized and accordingly the measures for coping with it have not been well developed.

Some students of the problem of disorderly community growth have advocated a direct approach to control of land subdivision. A direct approach might require, as an example, that subdividers obtain a certificate of convenience and necessity (similar to ICC certificates for transportation companies) before land could be subdivided. In Canada, a subdivision plat can be rejected on grounds that it is

⁴¹Webster, supra note 20, at 439.

premature or unneeded, but it is almost certain that we in the United States are not yet ready to accept this degree of control.⁴²

If direct measures are unlikely to be accepted at this time then one must agree with Yokley, who says, ". . . it would seem that, for the present at least, indirect controls are better suited to discouraging excessive and premature subdivisions."⁴³ Indirect controls are, if not better suited to the purpose, more likely to meet general acceptance.

Indirect controls

What are the methods or measures of indirect control? They are the requirements that the city can establish and force a would-be subdivider to follow. This kind of control is not necessarily under the police power, which has too long been thought the municipality's only weapon in this area, but may also be a matter of bargaining and cooperation. The city does not have to extend its utilities to serve too-distant areas, and it can determine whether, how, and when it will extend services to those who desire them.⁴⁴ If extension of services will be expensive the city must take pains to see that it will not be left holding the bag if the subdivision is not built up quickly and completely.

⁴²Canadian "development controls" are a product of a philosophy and approach to land use and regulation that is much different from our own. However, we may be getting a small start in this direction with our planned unit development controls.

⁴³Yokley, Zoning Law and Practice 454 (2d ed. 1953).

⁴⁴Control of municipally owned utilities usually offers no problems. Where private companies provide a utility, such as electric service, the municipality can often work out an agreement so that service is not extended to unapproved subdivisions. There could be a problem in some states because of public utility commission rules requiring companies to provide service for all customers in their areas.

If a developer wants to put in a subdivision twenty-five miles from the city limits and still wants city services, fine -- but the city must be able to set the terms for providing those services to that development. Extension of utilities, water, and sewage lines is vital to a development, and the city should not assume the responsibility of providing these at great cost to itself so that the developer can make a good profit. The city must be able to bargain with the developer, and to make him bear the cost burden, or to act as broker, passing the costs involved in a development along to those who buy lots or houses.

A city's control over extension of its utilities lines provides one means of discouraging some of the things prevalent in poor developments, such as poor sites, non-conforming streets, no dedication, and insufficient improvements by the developer, including absent or poor quality streets, markers, curbs, gutters, and sidewalks. Cities can and should refuse to extend their municipal services to such substandard, premature, excessive, partial, and scattered subdivisions, and state law should regulate the use of pumps and septic tanks so that they do not serve as instruments for evasion of municipal or county control.

The subdivider has a great responsibility in the creation of desirable, stable neighborhoods. His is a uniquely important part in the development of a city pattern.⁴⁵ The subdivider should realize - whether most do or not can be argued - that subdivision of land is

⁴⁵Toledo-Lucas County Planning Commission, Subdivision Regulations I (1946).

not merely a concern of the land owner and the developer, but that it affects the purchaser of lots and homes, the investor, and the local government. Subdividers who do realize the importance of subdivision to the whole community are also cognizant of the protection afforded them by subdivision control. Subdivision regulations protect the subdivider by insuring equal treatment for all, by discouraging land speculation, and by precluding the low grade, below-standard development of nearby areas.⁴⁶ In short, regulation can prevent any and all practices of the irresponsible "fly-by-night," speculative developers, who do almost anything for profit, practices that can and do injure the business and reputation of responsible businessmen in real estate.

It may be true that most subdividers have come to accept the notion of control, but there is still one thing that they have not been too willing to accept, and that is the idea that the subdivider should pay for improvements to his development. Too many still would like to do nothing more than grade a few streets, put up some markers, and then sell lots, leaving it up to the city or to the buyers to get their utilities and improvements.⁴⁷

There can be no mistake about it; the subdivider of land creates the need for improvements, which especially benefit that development - and the subdivider, and it seems entirely logical to conclude that the

⁴⁶Webster, *supra* note 20, at 438.

⁴⁷This conclusion is based on the writer's personal experience with developers, on conversations at professional meetings with other persons, who administer subdivision regulations, and on developers' statements. See the section on industry attitudes in Chapter III.

subdivider should bear the cost of improvements, not the taxpayer and not the municipality.⁴⁸ Too many municipalities have already found themselves in a precarious fiscal posture because the city fathers were persuaded to provide municipal services to a distant or premature subdivision, which did not and could not pay its own way.

There is a way, however, to assure the proper development of subdivisions that burdens unduly neither the subdivider nor the local government. The idea is that the person who buys a lot or house benefits most from improvements in the new subdivision, and should, therefore, be expected to bear a large share of the costs. Here again we come to the concept of the developer as a broker or "collection agent" for government. The rationale is that the newcomer should "buy into" the municipal corporation, a going concern, and become a part of it, paying his own way. He should not expect the local government to finance improvements and services for him at a great cost to the general public. Neither should he expect the developer to bear the costs of development without passing some along to the buyer. The developer provides a service for the buyer and for the city, if his subdivision is a sound one, and should earn a profit on his investment. It is reasonable to think that he will pass along to purchasers of his land and houses a part of the cost. It should be noted here that many governmental units recognize this role of the developer because they will, in many instances, refund to the developer a large part of his cost in providing a water system, for example.

⁴⁸Blevins v. Manchester (New Hampshire) 170 A. 2d 121 (1961); Zastrow v. Village of Brown Deer 9 Wisc. 2d. 100, 100 N.W. 2d. 359 (1950); Village of Lynnbrook v. Cadoo 252 N. Y. 308, 169 N.E. 394 (1929).

Another method of indirect control would call for the imposition of higher tax assessments immediately upon the platting of a new subdivision. This would force the developer to pay higher taxes and might conceivably cause him to pause to contemplate whether the time was right for such a development.

On the other hand, higher assessment can be used to force development of land that ought to be developed. This can prevent speculation by holding undeveloped tracts in developed areas. This method has excellent potential, because it could preclude a lot of the "leap-frogging" that occurs in and around our cities. "Leap-frogging" in general means that vacant parcels in or near town are passed over by developers in favor of less costly property farther out. This has been a great problem because of the costs involved in providing utility services across vacant land to these scattered developments.

There is another method that allows a city or county to effectively control subdivisions without subdivision regulations as such. Absent such regulations, a town or county can refuse to accept dedication of streets or roads that are inferior or undesirable. The town or county can also pass an ordinance requiring every new building to face on a public street. They can also ordain that every new building must be served by specified public utilities. These ordinances can actually preclude the subdivision of land in an undesirable way. The building inspector can refuse a permit for a house or houses in a development that does not have the approval of the local government.

This writer has actually seen this occur: a combination of such ordinances enabled a town to prevent building on fifty foot lots on "paper" streets. In this case sales had been made, based on a plat over 100 years old, but when it became clear that no building permits would be issued the buyers sent up such a hue and cry that the land company refunded all money.

Extensive use of some of these methods could prevent a lot of undesirable subdivision of land, and ideally located and constructed developments might then be possible.

Ideal Subdivisions

To get an ideal subdivision, building on land better suited for a non-residential use would be forbidden; building on low-lying lands would be prevented, because of the danger of floods and drainage problems; building on a thick rock stratum base would be precluded, because excavation of basements and installation of utility lines would be exceedingly difficult and costly; there would be no building on hard pan sub-soil, which precludes individual sewage disposal systems (this would be all right with central system); and there would be no building if ground water supplies were polluted or seriously deficient, in the absence of municipal water.⁴⁹

Further, an ideal subdivision would feature a plat developed from a topographic map, so that streets and other improvements - and houses - could follow the natural contours of the land.⁵⁰

⁴⁹ICMA, *supra* note 17, at 349.

⁵⁰Robert Cotten, "Types of Subdivisions," an address given at Right of Way Conference, February 8-9, 1962, University of Alabama.

Premature development would not be tolerated. What are the indications that an area is not ready for development? One might use these tests to determine the readiness of an area: growth in that direction, other subdivisions near by, proximity of utilities, and easy access from town.⁵¹

Adequate streets and other improvements -- curbs, gutters, sidewalks, permanent markers, water lines and hydrants, and sewers -- would be required for an ideal subdivision.⁵² The ideal development should be close to -- or have its own -- parks, playgrounds, and schools.⁵³ There should be reasonable expectancy of stabilized property values, which will depend upon many of these things. If there is (1) a good street system, without through traffic, (2) a convenient shopping center, with off-street parking, (3) church sites, (4) provision for school sites and recreation facilities, possibly in the same place, and (5) adequate yard space for the homes, the neighborhood should be fairly stable.⁵⁴

The neighborhood plan of development, which has enjoyed considerable popularity among planners, if not developers, is an effort to create a residential neighborhood that is related to the whole community but yet it possesses a distinction characterized by four strictly local factors: (1) a centrally located elementary school, no farther than one-half mile from the most distant dwelling; (2) scattered neighborhood parks and playgrounds, which should comprise about ten percent of the whole land area of the neighborhood; (3) local shops to meet the

⁵¹ *Ibid.*

⁵² Despain, *supra* note 34, at 424-25.

⁵³ Webster, *supra* note 20, at 437.

⁵⁴ Subdivision Regulations, *supra* note 44, at 1.

daily needs of the neighborhoods, grouped together on the periphery of the neighborhood; and (4) a residential environment which is the result of harmonious architecture, careful planning, centrally located community buildings, and a special street system which deflects through traffic on thoroughfares which bound the neighborhood.⁵⁵

Many people have written on the neighborhood plan, but probably the best known is Clarence A. Perry. His plan for a neighborhood called for a population of 5000 to 6000, in an area of 160 acres. There would be a school for every 1,000 to 1,200 children; no child would have to walk over one-half mile to school; and through traffic ways would be excluded so that children would not have to cross a main traffic way to get to school. There would be several parks, equal to about 10 per cent of the land area of the neighborhood. Perry thought that the schools should be in a civic center complex, with special buildings and ample grounds, plus churches and public buildings.⁵⁶

A slight variation in the neighborhood plan would have the various neighborhoods comprise a community, which would have a community center, with stores, shops, theaters, professional offices, and public buildings, a high school and play area, and through streets.⁵⁷

The neighborhood plan has been advocated⁵⁸ in many quarters, and occasionally it has been criticized.⁵⁹ Seldom, however, has it

⁵⁵Dahir, The Neighborhood Unit Plan: Its' Spread and Acceptance 16-17 (1947).

⁵⁶Perry, The Local Community as a Unit in the Planning of Residential Areas, passim (1926).

⁵⁷Subdivision Regulations, *supra* note 44, at 1.

⁵⁸"To Make Our Big Cities Friendly, Groups of Well-Planned Neighborhoods," LXI The American City 79-80 (February, 1946).

⁵⁹Isaacs, "The Neighborhood Theory," XIV Journal of the American Institute of Planners 15-23 (Spring, 1948).

been utilized.⁶⁰

Not all neighborhoods can be planned from the first, of course. In many instances it is necessary for us to get rid of our previous blunders, which means improving and reclaiming old neighborhoods. Then, with the comprehensive plan for the city firmly in mind, planning and developing on a neighborhood unit basis could give us the "city beautiful."

The neighborhood unit plan may not be the only way to achieve orderly community growth, but it is certainly a more attractive alternative than the helter-skelter development that has characterized urban growth in recent years. This writer is inclined to agree with Webster that "Over the long run, the building of sound and attractive neighborhoods is one of the best means of stabilizing property values."⁶¹ Sound neighborhoods will also mean orderly development and, therefore, fewer problems for the city and for the city taxpayer.

Why do we not have "ideal" subdivisions? Why do we have instead developments that depart so much from the requirements of an "ideal" subdivision? The answer is not simple; it is complex. Yet, one fact stands out. That fact is the lack of adequate subdivision regulations. Cities have a choice, of course. They need not plan. Neither must they adopt subdivision regulations as a means of implementing a plan. By ignoring planning, though, a city makes clear its choice. In so doing it chooses inconvenience, waste, confusion, ugliness, and conflicting aims. This is a costly choice.

⁶⁰Kincaid, "Organization of Neighborhood Units" American Planning and Civic Annual 91-92 (1947).

⁶¹Webster, supra note 20, at 437.

If a city chooses the other course it can avoid many of the pitfalls of planless growth. It need not be plagued with the consequences of inadequate subdivision regulations. It can prevent substandard, premature, and improperly located developments and all the attendant problems. The city will not be financially burdened by extending utilities to distant developments, maintaining poor quality streets, or installing improvements omitted by a fast-buck developer.

Subdivision regulation is essentially a conservative device. It is a means of protecting the public interest against those who would exercise their personal and property rights unrestrained, in the name of democracy, while trampling another's rights. This device protects the community, the general taxpaying public, mortgage lending institutions, those who buy land or houses in a new development, and even the developers.

CHAPTER V

ACCEPTED CONTROLS OF LAND SUBDIVISION

Local governments which regulate to any extent the subdivision of real property do so largely under the police power. In fact, "Government controls private action primarily under the police power. . . ." ¹ and unquestionably "The predicate for this exercise of authority (subdivision regulation) is the police power of the state, or rather, such part of the state's police power as may be delegated to the political subdivisions thereof." ²

The police power is not susceptible of easy definition. It has been termed "one of the most vague and ill-defined" ³ powers of government, but also ". . . the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." ⁴ In searching for a definition or a limit to this power, it has been said that "The public right of reasonable regulation for the common good and welfare is denominated the police power." ⁵ It has also been said that this authority coincides with the public need. "It may be said in a general way that the police power

¹Walker, The Planning Function in Urban Government 49 (1950).
²Yokley, Subdivisions 10 (1963).

³Morris, "Toward Effective Municipal Zoning" 35 Wash. L. R. 541 (Winter, 1960).

⁴D. C. v. Brooke, 214 U.S. 138, 149 (1909).

⁵Schmidt v. Board of Adjustment of Newark, 9 N.J. 405, 88 A.2d 607 (1952).

extends to all the great public needs."⁶ Courts have held that it does not have its genesis in a written constitution, but that it is ". . . an indispensable attribute of our society, possessed by the state sovereignties before the adoption of the federal constitution."⁷ The police power ". . . may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."⁸

Alfred Bettman said that the police power

. . . is simply all legislative power except those special subdivisions of legislative power which have names of their own, such as taxation. Consequently, in the nature of things, it is incapable of definition.⁹

The definition that we do have is outlined by constitutional lawyers ". . . as a series of pin-pricks made by successive court decisions, marking out the limits of regulatory power as it exists at any one time."¹⁰

Court decisions dealing with the police power probe the question of the proper role of government in relation to individual citizens in a democracy. "And as attitudes shift concerning the answer to this question, court decisions do likewise."¹¹ We should be quick to disregard contentions that a particular measure is invalid because it is beyond the scope of the police power. A measure may be invalid because it violates a constitutional requirement, but if no such violation

⁶Camfield v. United States, 167 U. S. 518 (1896).

⁷Schmidt v. Newark, 88 A.2d 607, at 611.

⁸Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

⁹Quoted in Green, Introduction to Part Four, Planning Law and Administration (1962).

¹⁰Id.

¹¹Id.

is found the measure must be considered a valid exercise of the police power.¹² In other words, it is useless to say, absent a clear violation, that a particular measure is beyond the scope of this almost limitless power.

Probably the police power comes to mind most quickly in connection with regulation of land uses. "It has long been recognized that the private use of urban land cannot be determined solely by the owner. . . ."¹³ The owner should be restrained, through exercise of the police power, from using his land so as to constitute a hazard or a nuisance to his neighbors.

The enforcement of zoning, subdivision, building and occupancy regulations finds its basis in the police power. The police power and the powers of eminent domain and taxation ". . . comprise a trilogy of fundamental powers available to American governmental units."¹⁴ Regulation of subdivisions, however, has been based heretofore almost completely on the police power.

It is generally agreed that the registration of a subdivision is a privilege, the right to confer which is granted to the community by the state. In return for this privilege the developer must comply with the requirements of the statutes and the local ordinances and regulations. It is said that, since this is the case, subdivision regulations ". . . can go far wider than zoning, which offers no compensating advantage."¹⁵ At any rate, subdivision control, like zoning, is an exercise of the police power.

¹²Id.

¹³Walker, "Land Use and Local Finance" Tax Policy 15 (1960).

¹⁴Green, supra note 9

¹⁵DeLafoos, Land Use Controls in the United States 61 (1962).

There have been, there still are, and there always will be, complaints about the use of the police power to control private property, but ". . . there is every reason why the police power can, and should, be involved in order to control this menace (unregulated subdivision of land) to health, safety, and the general welfare."¹⁶

A basic rule for use of the police power is that its exercise must have a reasonable and substantial connection with the public health, safety, morals, or general welfare. A contention that measures to regulate the subdivision of land under the authority of the police power do not have that reasonable and substantial connection is completely erroneous.¹⁷ The fundamental issue in subdivision control is the rights of the community against the rights of the individual. In a democracy there can be no serious doubt as to the proper resolution of this question. Neither can there be doubt about the use of the police power in this area. The police power extends to all great public needs,¹⁸ and there can be no doubt but that the regulation of private development is a great public need at this time.

The police power, called "the law of overruling necessity,"¹⁹ is ". . . based upon the fundamental premise of the supremacy of the rights of the community or the general public as against individual rights."²⁰ Of course, the extent to which municipalities can infringe on personal and property rights will be governed by the "strong and preponderant

¹⁶Cornick, Premature Subdivision 156 (1938).

¹⁷See Chapter III.

¹⁸Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

¹⁹Sanitary District v. Chicago & A.R. Co., 267 Ill. 252, 168 N.E. 312 (1915).

²⁰Miller v. Schoene, 276 U.S. 272 (1928).

opinion" as to what is ". . . greatly and immediately necessary to the public welfare,"²¹ but it is important to realize that the preponderant opinion of the people -- and consequently the opinion of the country's courts -- does change as conditions change. In the area of land subdivision it is obvious that the abuses of the past few decades' development has caused, and is still causing, a change of attitude on the part of the average American when it comes to unwise development of whatever kind. No longer is the financial gain of the private developer the most important factor. Instead, the reasons ". . . for the enactment of subdivision control regulations are now widely accepted, and the courts generally have upheld the exercise of this authority."²²

There is a maxim, salus populi suprema est lex, used in support of the police power. It means, "The welfare of the people is the highest law,"²³ and it states a proposition that is hard to attack on legal, logical, or other grounds. This maxim surely holds good when police power is applied to control land subdivision in order to protect the various individuals and groups involved, particularly the community as a whole, which has the largest and longest range interest in any kind of land use and development in or close to its boundaries.

The authority of the state to control community growth was explained in the landmark case of Mansfield & Swett v. West Orange:

²¹Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

²²ICMA, Local Planning Administration (3d ed. 1959).

²³Rhyne, Municipal Law, 529 (Sec. 26-2) (1957).

The state possesses the inherent authority -- it antedates the constitution -- to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restriction upon individual rights -- either of person or of property -- are incidents of social order, considered a negligible loss compared with the resultant advantages to the community as a whole. Planning conferred to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress.²⁴

The police power, like other powers of government, sanctions measures "commensurate with the common material and moral needs"²⁵ of the community, but it cannot be exercised in a capricious, arbitrary, or unreasonable manner. When police power measures regulate and limit individual rights, it is inevitable that such measures will at times conflict with the wishes of landowners, but

. . . the correlative restrictions upon individual rights -- either of the person or of property -- are mere incidents of the social order, considered a negligible loss compared with the benefits accruing to the community as a whole.²⁶

As time passes and conditions change the attitude of the people and the courts continue to move in the direction of favoring protection of the community interest rather than the interest of the individual developer, particularly the speculator, the premature developer, the shabby builder.

Attitudes about the extent of local regulation of land subdivision that is allowable have changed markedly over the past few

²⁴120 N. J. L. 145, 198 A.2d 225, 229 (1938).

²⁵Schmidt v. Newark, 9 N.J. 405, 88 A.2d 606 (1952).

²⁶Ibid. at 611.

years. Investigation of requirements and conditions imposed by the community on the developer will trace and tie down specifically the growth and expansion of the police power in this area and will demonstrate how the dominant American thought in this area has changed in the past few years.

Plat Registration

The basis for subdivision control is land registration, ". . . a privilege that government has the power to grant or withhold."²⁷ Statutes relating to the platting of the lands and local regulation of the process are not new, by any means. Such statutes were adopted as long ago as 1833 in Michigan and in 1839 in the Territory of Wisconsin.²⁸ The objectives of the earlier statutes were rather simple: to facilitate legal description and transfers of title,²⁹ and to prevent fraud.³⁰ These objectives, though worthy enough, do not explain fully the reasons for requiring plats to be recorded and the objectives thus attained. More relevant to present circumstances is the following statement:

The recording of the plat as provided by statute confirms the subdividing of the land in the manner and for the purposes shown by the plat, including the dedication of streets and alleys. Also until the plat of a proposed subdivision is recorded there can be no assurance that there will not be changes in the size of lots, layout of streets and alleys, restrictions and dedications, if any, or the use and purpose of the subdividing. The plat might be abandoned altogether, or several proposed places for subdividing may be prepared. . . . Until the plat is recorded a prospective purchaser has no assurance that

²⁷Delafons, supra note 15, at 25.

²⁸Vokley, Subdivisions 1-2 (1963).

²⁹"Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis" 9 Vill. L. Rev. 294, 296 (1964).

³⁰Bartelt, "Extraterritorial Zoning: Reflections on its Validity" 32 Notre Dame Lawyer 367, 401-402 (1957).

a subdivision will ever be established, and the lots and streets shown thereon are nothing more than lines on paper. The act of recording brings the subdivision into being and makes it a reality instead of a mere outline of a tentative proposal of the subdivider.³¹

It is this vehicle, plat registration, which affords a state and its creatures, the counties and municipalities, the opportunity to guarantee that the subdivisions that do become a reality are adequately improved for the needs of those who will inhabit them.

Since plat registration is a privilege, and not a right, a state legislature may attach certain conditions or may permit local governments to exact certain conditions from developers in order to attain registration of their plats. Early statutes required little of the developer. After some unfortunate experiences with poorly planned subdivisions and costly "land boom" failures of the 1920's, however, many states began to realize that more meaningful controls were needed to provide that subdivisions meet minimal standards of construction and design and would conform to existing neighborhood patterns for streets and drainage. Under the police power, the states began to provide enabling legislation which permitted city or county governments to pass local ordinances consistent with the state policy expressed in the act, to be administered by local planning boards. These regulations generally provide that before a planning board or other agency approves a subdivision map for final filing in accordance with the state statute, it may exact certain specified conditions with which the subdivider must comply. While the nature of the conditions depends on the authorization in a particular state statute, it is almost uniformly provided that dedication

³¹Northern Indiana Public Service Co. v. McCoy, 157 N.E. 2d 181 (1959).

-- and often, improvement -- of subdivision land for streets, gutters, drainage facilities, and sewers may be required of the developer.³² Discussion and analysis of case law will indicate what improvements have been required of developers and what the courts have accepted as valid conditions precedent to plat registration.

Subdivision Fees

First of all, the validity of exacting fees for checking, filing, and recording plats and for field inspection of subdivisions has been accepted by the courts for many years. The idea is that the fee, which ought to be established by ordinance, should cover the cost of administration of the subdivision regulations. It should, therefore, be a reasonable fee. In Prudential Coop. Realty Co. v. Youngstown³³ the court upheld a fee to cover the expenses of regulating subdivisions, but warned of overly large fees, indicating that any large excess of funds produced by such a fee might bring the validity of the fee into question.

These fees are imposed under the power to regulate (the police power) rather than under the power to tax; adoption of this type of fee requirement is not a revenue measure. The question of whether such a fee was a regulation or a tax measure was raised in Kesselring v. Wakefield Realty Co.³⁴ Here the Wakefield Realty Company contended that

³²Ayres v. City Council of Los Angeles, 34 Cal. 2d 231, 207 P.2d 1 (1949); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E. 2d 371 (1956); Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).

³³118 Ohio St. 204, 160 N.E. 695 (1928).

³⁴227 S.W. 2d 416 (Ky. Court of Appeals, 1950).

the subdivision fee assessed against it was a tax, but the court held that the county planning and zoning commission could set reasonable fees, under the police power, not the tax power, to cover the cost of expenditures involved in subdivision approval and plat registration.

The simplest method is one in which the local legislative body requires a set lump-sum fee to cover all administrative costs. Perhaps a more common way calls for a base fee, with an added amount for each additional lot or acre above the base figure. Still another approach requires separate fees for field inspections and for handling costs. A slight variation is to be found in a method requiring set fees for field inspections and a sliding scale for paper work costs, depending on volume.

Whichever of these methods is utilized, it is clear that a reasonable fee, established by ordinance, is a valid exercise of the police power and will be upheld.

Streets

Statutes providing for dedication, grading, and paving of streets, thus giving access by suitably approved roads for each dwelling, reflect the legislative judgment that development of unimproved areas should be accompanied by provision of roads, streets, and other essential facilities to meet the basic needs of the new residents of the area.

It is difficult to imagine a more basic need than streets, particularly in this automobile-dominated era in which we live. Streets

are a vital consideration in city planning, and are perhaps the crucial element in any one subdivision plan. One factor that illustrates this point is the amount of land used for streets in our cities. The following table is informative.

TABLE I
Land Area Devoted to Transportation

<u>Cities</u>	<u>Percentage of Developed Area in</u>		
	<u>Streets</u>	<u>Railroads</u>	<u>Both</u>
Manhattan	33.4	2.5	35.9
New York City	32.5	6.0	38.5
Chicago	28.4	---	28.4
Philadelphia	24.9	---	24.9
5 Selected Central Cities (250,000-1,000,000 population)	24.7	4.4	29.1
7 Selected Central Cities (100,000-250,000 population)	27.6	5.4	33.0
10 Selected Central Cities (50,000-100,000 population)	26.1	5.8	31.9
8 Selected Central Cities (25,000-50,000 population)	28.1	5.9	34.0
10 Selected Satellite Cities (over 25,000 population)	26.9	5.9	32.8
10 Selected Satellite Cities (10,000-25,000 population)	24.7	3.0	27.7
5 Tennessee Cities (10,000-25,000 population)	23.0	2.9	25.9

SOURCE: Walker, "Land Use and Local Finance" Tax Policy (1960).

The table shows that from 23 per cent to 33.4 per cent of the developed area of the cities in this study was used for street purposes. One sees that the larger cities in the study had larger areas of land in street use. It seems that as a city increases in size the preparation of the developed area devoted to residential purposes tends to decrease, and there is an accompanying demand for acreage for streets. It is also true that premature and excessive subdivision will exaggerate the ratio of land in streets, sometimes giving an unbelievable figure. In any case a substantial portion of urban land is devoted to streets. The amount is generally considered to be about one-third of the total, and this amount increases as streets are widened, new approaches, new intersections, and new expressways constructed.

The importance of streets must be obvious. Equally obvious, now, is the municipality's ability to force a developer to dedicate and improve land in his subdivision for streets.

³⁵It might be well at this point to distinguish between dedication, reservation, and easement. A dedication is an outright transfer of fee simple title to the governing body. A reservation simply "reserves" the land; title does not pass. It is a "notice" that the governing body intends to acquire the land by paying for it at a future date. Reservations are used quite commonly for prospective school land. The advantage, of course, is that the developer cannot build on the land; and the land cost, when finally acquired, will be cheaper. The disadvantage is that the reservation is not always exercised, and a piece of land that may be hard to dispose of is left in the subdivision. An easement simply is a qualification on the use of the property. Title remains in the property owner, but he gives someone else -- a governing body, a utility company, or even a private person -- the right to do something within the easement without further permission of the property owner.

³⁶Walker, *supra* note 9 at 12-13.

³⁷Mabel Walker notes that St. Petersburg, Florida, in 1941, had fifty-seven per cent of its developed area in streets. Walker, *supra* note 9, at 16.

Dedication

One of the main purposes of subdivision regulation is to require a subdivider to install properly the streets necessary for a new subdivision.³⁸ It is a settled legal principle that a municipality can require a subdivider to dedicate and improve land in his development for streets as a condition precedent to plat approval. The courts have reasoned that the developer may be required to bear costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public.³⁹ Further the courts have accepted the notion that the subdivider creates the need for streets when he subdivides land and should bear the cost for them, since the need is "uniquely attributable" to his activity.

Subdividers, understandably unhappy with this line of thinking, invariably claimed that the governmental action amounted to an eminent domain taking of private property for public use without payment of just compensation, in violation of federal and state constitutions.⁴⁰ The reply to their contention was provided in the early case of Riddefield Land Co. v. Detroit,⁴¹ in which a required dedication was upheld. The court rejected the contention that this was an exercise of eminent domain, and stated its reasoning as follows:

³⁸Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

³⁹Rosen v. Donners Grove, 19 Ill. 2d 448, 167 N.E. 2d 230 (1960); Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961).

⁴⁰Heyman concludes that there is no violation of either due process or equal protection clauses of the fourteenth amendment of the federal constitution where there is equality of treatment between contemporaneous subdividers. "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L. J. 1119 (1964).

⁴¹241 Mich. 468, 217 N.W. 58 (1928).

Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any reasonable condition which must be complied with before the subdivision is accepted for record. In theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantages and privilege of having his plat recorded. Unless he does so, the law gives him no right to have it recorded.⁴²

The statement by the court in a land mark case again illustrates how subdivision regulation hinges on plat registration; it points out that "any reasonable condition" may be exacted; and it states the theory that dedication is "voluntary," because a land owner does not have to subdivide his land unless he wants to do so. The court correctly spoke of the "theory" of voluntary dedication because, as a practical matter, the lack of an alternative method for subdividing land in most states makes dedication something less than voluntary. One need not be troubled by this point. The landowner may put his land to other uses. If, however, he wants to subdivide it he must meet certain conditions. This is well settled doctrine.

"Dedication" is an appropriation of land to a public use, made by the owner of the fee, and accepted for such use by the appropriate public body in behalf of the public.⁴³ There are two kinds of dedication, common law and statutory. A statutory dedication is one made in conformity with the provisions of a statute. The difference between a statutory dedication and a common law dedication is that the former operates by way of a grant while the latter operates by way of an estoppel

⁴²241 Mich. 468, 472; 272 N.W. 58, 59 (1928).

⁴³Whipporwill Crest Co. v. Stratford, 145 Conn. 268, 141 A.2d 241 (1958).

in pairs.⁴⁴ In order to constitute a valid statutory dedication the provisions of the statute must be substantially complied with, and the acts required must be performed substantially in the manner required.⁴⁵ No particular formality is required to constitute a common law dedication. The dedication may be express, where intention to dedicate is expressed in oral or written declaration of the owner; or it may be implied from acts and conduct of the owner.⁴⁶

The general rule seems to be that where a landowner lays off his land in lots and blocks and designates on his plat certain portions of the land as streets, followed by a sale of lots with reference to a map showing such streets, this constitutes a dedication thereof, as public ways, to the use of the purchaser and the general public.⁴⁷ Where such sale occurs the right of purchasers will be protected in equity.⁴⁸ It has been held that, in the absence of contrary evidence, such sale indicates a clear intention to dedicate, even though the plat may have contained no express words of dedication.⁴⁹

A "dedication" requires an "acceptance" of some kind, either under statute or common law. What constitutes acceptance? Where there is a relevant statute governing dedication, dedication that meets the

⁴⁴Poindexter v. Schaffner, 162 S.W. 22 (Tx. Civ. App. 1914).

⁴⁵Id. at 26.

⁴⁶Whipporwill Crest Co. v. Stratford, 145 Conn. 268, 141 A.2d 241 (1958).

⁴⁷Highway Holding Co. v. Yara Engineering Corp., 22 N.J. 119, 123 A.2d 511 (1956); Northern Indiana Public Service Co. v. McCoy, 157 N.E. 2d 181 (Ind., 1959); Barbee v. Carpenter, 267 S.W. 2d 768 (Ark., 1954); Foster v. Atwater, 226 N.C. 472, 38 S.E. 2d 316 (1946); Martin v. Fuller, 214 La. 404, 37 So. 2d 851 (1948); Kennedy v. Hawkins, 346 P.2d 342 (Okla., 1959); Snead v. Tatum, 25 So. 2d 162 (Ala., 1946); Corbin v. Cherokee Realty Co., 91 S.E. 2d 542 (S.C., 1956); Cucchiara v. Robinson, 34 So. 2d 84 (La. App. 1948);

⁴⁸Brodv. Brown, 172 A. 2d 152 (Pa., 1961).

⁴⁹Application of Stein, 99 N.W. 2d 204 (Minn., 1959).

requirements of the statute does not have to be formally accepted by a town board.⁵⁰ The statutory dedication becomes complete when the plat or map is recorded, or other statutory conditions are complied with.⁵¹ It must be noted, however, that the approval of a plat containing an offer to dedicate as a condition precedent to plat approval may not be considered the equivalent of a formal acceptance where the statute does not expressly declare that such approval constitutes acceptance of the offer to dedicate.⁵²

A common law dedication requires a clear acceptance.⁵³ This can take the form of a formal resolution;⁵⁴ inclusion of the dedicated streets in the official map;⁵⁵ acts of government officials exercising control over the streets,⁵⁶ such as expenditure of public money for improvement or repair⁵⁷ or placing utilities therein,⁵⁸ or some other official act of a municipality in regard to the dedication offered;⁵⁹ or by long, continued public use.⁶⁰

It is plain that recording a plat, under the common law, is merely an offer to dedicate, and the offer must be accepted to make the

⁵⁰Application of Stein, 99 N.W. 2d 204 (Minn., 1959); Keyes v. Excelstor, 126 Minn. 456, 148 N.W. 501 (1914).

⁵¹Collins v. Zander, 61 So. 2d 897 (La. App. 1952).

⁵²Board of County Commissioners of Highlands County v. F. A. Schring Realty Co., 63 So. 2d 256 (Fla., 1953).

⁵³Collins v. Zander, 61 So. 2d 897 (La. App. 1952).

⁵⁴Arnold v. City of San Diego, 261 P.2d 33 (Cal. App. 1953).

⁵⁵Bryan v. City of Sanford, 224 N.C. 30, 92 S.E. 2d 420 (1956).

⁵⁶Graves Company v. City of Mayfield, 305 Ky. 374, 204 S.W. 2d 369 (1947).

⁵⁷Hooker v. Grosse Point, 328 Mich. 621, 44 N.W. 2d 134 (1950).

⁵⁸Consumers Co. v. Chicago, 268 Ill. 113, 108 N.W. 1017 (1915).

⁵⁹Knoxville v. Hunt, 156 Tenn. 7, 229 S.W. 789 (1916).

⁶⁰Hooker v. Grosse Point, 328 Mich. 621, 44 N.W. 2d 134 (1950); Graves Company v. City of Mayfield, 305 Ky. 374, 204 S.W. 2d 369 (1947); Arnold v. City of San Diego, 261 P.2d 33 (Cal. App. 1953).

process complete.⁶¹ The preponderance of legal opinion holds that plat approval does amount to immediate dedication of streets to purchasers of lots in the subdivision,⁶² but not to the municipality, even though the town council approves the plats.⁶³ The situation is well handled in California; under the subdivision statute the words of dedication on a map are treated merely as an offer, and the dedication is not complete until the city moves to accept. Even though ambiguities are usually resolved in favor of the public and against the grantor,⁶⁴ it is obviously best to have a statute that is clear on dedication and acceptance.

It is preferable to allow the city some discretion in accepting offers of dedication. It can then refuse to accept streets that are not properly constructed, and thus exert pressure on the developer, because potential purchasers are not very likely to buy lots on streets not accepted as public ways.⁶⁵

There are any number of cases upholding street dedication requirements,⁶⁶ but after the landmark Ridgefield case the most important cases are, without a doubt, Ayres v. City Council of City of Los Angeles⁶⁷

⁶¹Village of Maxwell v. Booth, 161 Neb. 300, 73 N.W. 2d 177 (1955).

⁶²Shurtlett v. Pikeville, 309 Ky. 420, 217 S.W. 2d 976 (1949).

⁶³Western Springs Park Dist. v. Lawrence, 343 Ill. 302, 175 N.E. 579 (1931); In re Vacation of Plat of Garden City, 266 N.W. 202 (Wisc., 1936); Tuxedo Homes v. Green, 63 So. 2d 812 (Ala., 1953); Highway Holding Co. v. Yara Engineering Corporation, 123 A.2d 511 (N.J., 1955); Rose v. Fisher, 42 S.E. 2d 249 (W. Va. 1947).

⁶⁴Haven Homes v. Raritan Township, 19 N.J. 239, 116 A.2d 25 (1955); Russell v. Russell County Building & Loan Ass'n., 154 Kan. 154, 118 P.2d 121 (1941).

⁶⁵Stump v. Cornel Const. Co., Cal. 2d, 175 P.2d 510 (1946).

⁶⁶See also the section on Street Width Requirements.

⁶⁷34 Cal. 2d 31, 207 P.2d 1 (1949).

and Miller v. Beaver Falls.⁶⁸ These cases are important because they show how far the opposing judicial views have gone or would like to go.

The concern in the Miller case is not really streets. It is a case on required park land reservation; but the Pennsylvania Supreme Court reasoned from a street dedication premise, and in so doing revealed its position on that subject to be completely at variance with the view of courts of all other states.

Some of the statements of the court are certainly worth quoting. The city contended that the court should approve the forced reservation of park land as being in conformity with, and an extension of, the principal of forced street dedication. The court replied with the following reasoning:

It follows that the aforesaid cases involving a platting of streets should not and do not provide authority for an extension of the principle or doctrine therein enunciated. A principle of questionable constitutionality should not be extended beyond its present application or limitation. . . .⁶⁹

The court followed this line of thought, saying that "The law with respect to streets is too firmly established in Pennsylvania to be changed, but that is no reason or justification for extending it."⁷⁰

There can be no doubt about it. This court definitely did not favor street dedication as a condition precedent. After expressing a general unhappiness with the principle, the court mentioned two old cases that were always relied on to uphold the principle, saying that even there the real issue had never been truly decided.⁷¹ The court

⁶⁸368 Pa. 189, 82 A.2d 34 (1951).

⁶⁹82 A.2d 34, at 37 (emphasis added).

⁷⁰Ibid.

⁷¹Ibid.

stated that, although it was too late to do anything about the principle, it felt strongly that forced street dedication violated the Bill of Rights and the Fourteenth Amendment.⁷²

At the other extreme is the thinking that is typified by the Ayres case. This case has been widely cited, because it expresses a liberal interpretation, not relying on specific statutory authority to uphold conditions imposed under local ordinance.

Ayres petitioned for mandamus, seeking plat approval without acceding to certain conditions imposed by the city. He owned a long, triangular thirteen acre tract, the last in the area to be subdivided. The city, acting under a local ordinance,⁷³ imposed four requirements which Ayres contended against: (1) It required that a ten foot strip be dedicated for 1500 feet, the length of Ayre's property as it fronted on Sepulveda Boulevard; (2) reservation of a ten foot strip on rear lot lines was required for planting, to prevent access to the artery; (3) the extension of 77th Street as it came through plaintiff's property was required to be eighty feet wide instead of sixty feet; and (4) the small triangular area⁷⁴ remaining at the intersection of Sepulveda Boulevard, Arizona Avenue, and 79th Street was required to be dedicated in order to eliminate a traffic hazard.⁷⁵

These specific requirements were not expressly provided for in California's Subdivision Map Act, which vests design and improvement

⁷² Ibid.

⁷³ Ordinance #79,310 of the City of Los Angeles.

⁷⁴ The parcel was seventy-five feet long on two sides, and the other side was twelve and one-half feet wide. It was 469 square feet in area.

⁷⁵ 207 P.2d 1, at 3 (1949).

controls in municipal governing bodies.⁷⁶ The act treats primary and secondary streets, alignments, widths, grades, curbs, tangents, intersections, dead-ends, private streets, alleys, size and frontage of lots, side lines, blocks, sewage and drainage facilities, existing improvements, dangerous areas, walks, and the like.⁷⁷ The Court stated that the plaintiff's contention was ". . . that no condition may be exacted which is not expressly provided for in the Subdivision Map Act or the provisions not in conflict therewith. . . ." ⁷⁸ The court said, in reply that "It must be obvious from the outset that this effect may not be drawn from the statute or the city's organic law or ordinances."⁷⁹

In its discussion of the four requirements, the court made the following points. On the first condition, the dedication of a ten foot strip on Sepulveda Boulevard, the court found that the creation of this subdivision would create traffic - and other - problems, necessitating the widening of the Boulevard. This widening would benefit all lot owners, and the requirement was held to be reasonably related to protection of public health, safety, and general welfare. It should be noted that this widening had already been contemplated by the city.⁸⁰

The court held that the reservation for a ten foot planting strip (this appears to be an easement) would be necessitated by the creation of the subdivision; that such a strip would serve to screen noise, fumes, and views, and would, therefore, be reasonably related to protecting the public health, safety, and general welfare.⁸¹

⁷⁶Section 11525.

⁷⁷207 P.2d 1, at 4.

⁷⁸Ibid.

⁷⁹Id. at 5.

⁸⁰Ibid.

⁸¹Ibid.

The court held that the third condition, an eighty foot right-of-way for 77th Street instead of sixty feet, was not unreasonable.⁸²

On the fourth and final condition, the court held that the subdivision of this land in question would create hazards necessitating the dedication of this small triangular plat. Such dedication would benefit lot owners, and was, therefore, reasonably related to the protection of public health, safety, and general welfare. The court pointed out that, as was true with the first and second conditions, the city had contemplated getting the small parcel in order to eliminate a potential hazard.⁸³

The court decision seems to have been based on three major points: (1) importance of the neighborhood plan; (2) proper interpretation of the Subdivision Map Act; and (3) the burdens each additional subdivision creates in a large metropolitan area.

On the first point, importance of the neighborhood plan, the court said this:

In his arguments the petitioner appears to have lost sight of the particular type of lot subdivision and uniformity of neighborhood design and plan theretofore applied in the locality, including the requirement for strip dedication for widening purposes and strip reservation for planting purposes without dedication.⁸⁴

On points one and two the court stated that

... consideration of these matters (neighborhood design and plan) is not precluded by the provisions of the Subdivision Map Act, but on the contrary, both the statutory provisions and the local law indicate that the subdivision design and use should conform to neighborhood planning and zoning requirements.⁸⁵

Thus the court laid aside plaintiff's contention that such conditions were not countenanced under the statute.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid., at 6.

⁸⁵ Ibid.

The court in Ayres emphasized the problems that new subdivisions can cause. The court said that questions of reasonableness and necessity depend on matters of fact; that they are not merely abstract ideas and theories, and that "In a growing metropolitan area each additional subdivision adds to the traffic burden."⁸⁶ The court seemed occupied by the potential traffic burdens and possible hazards that subdivision without the required conditions might create, as well it should be concerned with such matters.

On the basis of the ideas discussed here the court held these conditions validly imposed by Los Angeles, under its local ordinance and the Subdivision Map Act. Though this case is understood in a variety of ways, the only disturbing factor, to this writer, is the court's willingness to accept such conditions knowing that the city had already contemplated condemnation and reservation, whether Ayres subdivided or not. This, however, is mitigated by the fact that all the property around Ayres was developed, and the city's contemplation only served to make evident the necessity for requiring these conditions if and when subdivision occurred.

The general plan, street widths, and design

Street design is vitally important in platting a new subdivision. Most statutes and ordinances provide that the streets must conform to the mapped streets ordinance or major street plan. This means that the streets in a new subdivision must mesh with those already in existence and those to be developed later. Therefore, requirements for street

⁸⁶Id. at 7.

widths are necessary. It is also desirable to avoid through traffic on local residential streets; prevent hazardous intersections; to largely eliminate the use of cul-de-sacs, except where temporary; and prevent reservation of strips of land that would thus allow a developer to preclude the opening of streets on property adjacent to his subdivision. To avoid these problems the subdivision regulations must be strict, precisely written, and strictly enforced. Above all, it is crucial that the streets in a proposed subdivision be laid out in accordance with the general plan. Streets are clearly for the use of all the public, not just those residents of a particular development, and they should be laid out so as to facilitate easy and convenient travel, without dead-ends, awkward and hazardous jogs, poor intersections, irregular designs, or changes in pavement width from one section of the same street to another.

It seems that the requirement that proposed streets conform to the master plan has been most frequently contested on the street width requirement. In Ridgefield Land Co. v. Detroit⁸⁷ the Supreme Court of Michigan upheld the planning board's rejection of a plat whose street widths in two instances did not conform to the general plan. The city of Detroit adopted such a general plan in April of 1925, under specific authority granted by State law:

The Governing body shall determine as to whether . . . all highways, streets and alleys conform to the general plan that may have been adopted by the governing body of the municipality for the width and location of highways, streets and alleys.⁸⁸

⁸⁷241 Mich. 468, 217 N.W. 58 (1928).
⁸⁸Act No. 360, Public Acts of 1925.

The law provided that the governing body could reject a plat not conforming to the provisions of the act; it did so in this case, and was upheld, thus sustaining the validity of requiring conformity to the general plan.

The decision in Ayres v. City Council of City of Los Angeles⁸⁹ also upholds the validity of requiring streets to conform to the general, or master, plan. In this case, the court went even further, holding that the required street widths could be upheld on the basis of conformity with neighborhood plans.⁹⁰

The City of Los Angeles had begun work on its master plan in 1940, and it had not been completed when this case was heard. The court in Ayres held that it did not matter that the master plan was not yet finished:

Nor does the fact that master plans are incomplete or that the specific details are not shown thereon affect the result. It was in evidence the city had been working toward the formulation of a complete and entire master plan, although all the elements or parts thereof were not as yet in the final stage of completion.⁹¹

It is clear that the court decision here relied on the "uniformity of neighborhood design and plan theretofore applied in the locality," in conjunction with the active and continuing work toward completion of the master plan.⁹² The importance of neighborhood planning and traffic conditions was emphasized again in the court's statement in Mefford v. City of Tulare:⁹³

⁸⁹34 Cal. 2d 31, 207 P.2d 1 (1949).

⁹⁰Id. at 2.

⁹¹Id. at 7.

⁹²Id. at 6.

⁹³228 P.2d 847 (1951).

it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the Ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.⁹⁴

A local requirement concerning street widths was also upheld in Petterson v. Naperville.⁹⁵ Here the city requirement for a twenty-five foot paving width was upheld as a part of the official plan of the city, adopted under specific authority of the Illinois Law.⁹⁶

The court's reasoning is worthy of note:

The privilege of the individual to use his property as he pleases is subject always to the legitimate exercise of police power, under which new burdens . . . and new restrictions may be placed upon its use when the public welfare demands it.⁹⁷

The court went on to state that the fact that an ordinance ". . . may operate to impose burdens or restrictions on property which would not have existed without enactment of the ordinance is never determinative of its validity."⁹⁸

The court in the Petterson case held that the imposition of reasonable regulations is not a violation of the constitutional requirement of uniformity of taxation or taking of private property without just compensation. The ruling of the court in Newton v. American Sec. Co.⁹⁹ is essentially the same. In this case mandamus was brought to force Newton, the circuit court clerk, to record a plat which had been rejected by the city and county planning boards because of the developer's refusal to

⁹⁴ ibid. at 851.

⁹⁵ 111. 2d 233, 137 N.E. 2d 371 (1956).

⁹⁶ 111. Rev. Stat. 1945, Ch. 24, pars. 53-1, 52-2, 53-3.

⁹⁷ 111. 2d 233, 127 N.E. 2d 371, at 379.

⁹⁸ ibid.

⁹⁹ 201 Ark. 943, 948, S.W. 2d 311 (1941).

dedicate strips of land to widen existing county roads abutting his property on two sides. The circuit court had held the planning board's requirement to dedicate for widening unauthorized and noted the lack of provision for compensation. The Supreme Court reversed the circuit court on the grounds that state law¹⁰⁰ provided for the adoption by the local government of a master plan, and rejection of plats not in conformance therewith. In its opinion the court made the following statement concerning allegations of taking of property without compensation:

Of course one's property cannot be taken for public use without compensation, but the evidence in this case clearly shows that no one is attempting to take the property of appellee. The record shows that the appellee itself is seeking to take advantage of the county and city. . . .¹⁰¹

The same issue -- taking property without just compensation -- was again raised in Krieger v. Planning Commission of Howard County.¹⁰² In this case a local ordinance allowed officials to require dedication of a portion of plaintiff's land for future highway widening purposes. To the contention that such constituted a taking of private property for public use, the court stated that "There is nothing in the record to show a present taking, as distinguished from a regulation of use." Furthermore, ". . . the power of a municipal corporation to impose reasonable conditions upon the issue of a permit (to file a plat) can hardly be doubted."¹⁰³

There are a few other cases in which the validity of street width requirements and layout required under a general plan has been

¹⁰⁰State Act 108 of 1929, as amended by State Act 295 of 1937.
¹⁰¹201 Ark. 943, 948 S.W. 2d 311, at 134.
¹⁰²224 Md. 320, 167 A.2d 885 (1961).
¹⁰³167 A.2d 885, at 886.

upheld,¹⁰⁴ but the cases above are the major ones, and they provide valuable insight into the reasoning behind the decisions.

The case of Crescent Development Corporation v. Planning Comm. of the Town of New Canaan¹⁰⁵ is important because of the courts holding that, in addition to attaching reasonable conditions relating to the manner of street design and layout, the planning commission could go so far as to consider the street plans of a nearby municipality.

The importance of providing streets of uniform width was stressed by the court in Garvin v. Baker.¹⁰⁶

It requires no citation of authority to establish the fact that a wide street changing into a narrow street or a narrow street changing into a wide street constitutes a hazardous traffic condition. Accidents are happening upon the highways every day where the width of a road or street is suddenly changed, or a wide road runs into a narrow bridge. The changing of the width of streets and roads involves the public welfare and safety to a high degree, and public authorities having jurisdiction of such matters have a duty to perform in order to protect the public from hazardous and dangerous conditions.¹⁰⁷

In this case it was evident that the proposed streets did not conform to the existing street pattern.¹⁰⁸

Many statutes and ordinances provide that a subdivision plat may be rejected for design deficiencies aside from those pertaining to street layout. Peculiar lot lines, for example, may be cause for rejecting a plat,¹⁰⁹ as may lots that are too small.¹¹⁰

¹⁰⁴State v. City Council of City of Minneapolis, 168 N.E. 188 (1918); Lewis v. Minneapolis, 140 Minn. 433, 168 N.W. 188 (1910); Rettig v. Planning Board of Rowley, 126 N.E. 2d 104 (1955).

¹⁰⁵148 Conn. 145, 168 A.2d 547 (1961).

¹⁰⁶59 So. 2d 360 (S. Ct. of Fla. 1952).

¹⁰⁷59 So. 2d 360, at 362 (1952).

¹⁰⁸59 So. 2d 360, at 362.

¹⁰⁹State ex rel. Pratts v. City Planning and Zoning Commission of New Orleans, 59 So. 2d 832 (La. App. 1952).

¹¹⁰Krieger v. Planning Commission of Howard County, 224 Md. 320, 167 A.2d 885 (1961); Garvin v. Baker, 59 So. 2d 360 (Fla. 1952).

Grading and paving

It has been seen that the power of a municipality to open, establish, and lay out streets includes the power to require dedication of land for streets as a condition for plat approval, the power to fix the width of streets, and the power to require streets in new subdivisions to conform to the general plan.

A local government's power in this area also includes the right to require that the streets in a new subdivision be graded and paved. This is a logical extension of the dedication, width, and design requirements. Though one case, Lewis v. Minneapolis,¹¹¹ held that a municipality could not require street grading under a statute that referred only to direction and width of streets, this is an old case (1910), and does not rule. Much more typical of judicial thinking is the comment in Ridgefield Land Co. v. Detroit,¹¹² that a city can "... impose any reasonable condition which must be complied with before the subdivision is accepted for record."¹¹³ Allen v. Stockwell,¹¹⁴ another case that goes way back, went so far as to uphold ordinance provisions requiring grading and paving of streets under general home rule powers, without specific statutory authority.

A requirement that a profile map be provided the planning board so that street grades could be checked was approved by the court in Mefford v. City of Tulare.¹¹⁵

¹¹¹140 Minn. 433, 168 N.W. 188 (1910).

¹¹²241 Mich. 468, 217 N.W. 58 (1928).

¹¹³241 Mich. 468, 217 N.W. 58, 59 (1928).

¹¹⁴210 Mich. 488, 178 N.W. 27 (1920).

¹¹⁵102 Cal. App. 2d 919, 228 P.2d 847 (1951).

Brous v. Smith upheld a town law requiring that ". . . all streets or other public places shown on such plats shall be suitably graded and paved." ¹¹⁶The law spelled out what "suitable" grading and paving was.

If dedication, design, conformity, width, grading and paving can be required, then surely local governments can require that the paving meet prescribed standards. The Illinois court agrees; in Petterson v. Naperville it said

We believe the power to prescribe reasonable requirements for public streets . . . Includes more than a mere designation of the location and width The legislature undoubtedly had in mind [that]. . . in the interest of conformity, continuity, and of public health and safety, the streets should be constructed in such a way as to afford reasonably safe passage. . . .¹¹⁷

Grading and paving requirements reflect a legislative judgment that certain basic facilities, such as streets, built to minimum standards, are necessary if developing areas are to be adequately served.

Curbs, gutters and drainage

The reasonableness of requirements that developers provide curbs, gutters and drainage of streets in their subdivisions has been upheld in a wide range of cases.

In Petterson v. Naperville ¹¹⁸the court upheld such a requirement:

¹¹⁶304 N.Y. 164, 106 N.E. 2d 503, 508 (1952).

¹¹⁷9 Ill. 2d 233, 137 N.E. 2d 371, 378 (1956).

¹¹⁸9 Ill. 2d 233, 137 N.E. 2d 371 (1956).

. . . considering the expressed object and purpose of the legislation, it is our conclusion that the provisions of the ordinance requiring curbs and gutters and proper drainage are within the powers conferred by the statute.¹¹⁹

The city had acted under statutory authority.¹²⁰ Petterson submitted a plat that met county approval; it showed twenty foot streets, no curb or gutter, and open drainage ditches. The city, with one and one-half mile extraterritorial jurisdiction, rejected this plat and he sued for a declaratory judgment that the city extraterritorial subdivision regulation was void. The Supreme Court of Illinois, in addition to supporting the extraterritorial provision of the subdivision regulations, found that the curb, gutter, and drainage requirements were not an unreasonable or arbitrary exercise of municipal power.¹²¹

The fact alone that the cost of curbs and gutters and the drainage facilities prescribed by the subdivision control ordinance would be greater than the cost of open ditches and culverts forms no basis for the finding (by the Circuit Court) that the ordinance is arbitrary, unreasonable, or discriminatory.¹²²

The court held that "There is no proof whatever that the ordinance affects plaintiff's property any differently than other property within the area in question,"¹²³ thus giving support for the position that the cost imposed on a developer is not the key factor in the court's decision. The court went on to say that one who challenges an ordinance as unreasonable and arbitrary must show as much by clear and affirmative

¹¹⁹137 N.E. 2d 371, at 378.

¹²⁰Ill. Rev. Stat. 1945, Ch. 24, Pars. 5-3-1, 5-2-2, 5-3-3.

¹²¹137 N.E. 2d 371-372.

¹²²137 N.E. 2d 371, at 379.

¹²³Ibid.

evidence and must prove that there is no permissible interpretation that would justify its adoption. Plaintiffs in this case offered no convincing proof.¹²⁴

A drainage facility requirement was upheld in Allen v. Stockwell,¹²⁵ and a requirement for curb and gutter was upheld in Garvin v. Baker,¹²⁶ without enabling legislation in either case. Magnolia Development Co. v. Coles¹²⁷ is contrary, however. In this case the plaintiff sought mandamus to order approval of its third subdivision plan. The first two had been approved, and the area developed, but municipal officials were dissatisfied with the manner of development, claiming that the roads were improperly constructed. There were no sidewalks, drainage was not proper, and the soil was not suited for septic tanks, which were being installed. The officials had no success in appealing to the plaintiff company.

When the final plat was submitted, the governing body of the borough, by resolution, refused approval on these grounds:

It appears that the Magnolia Development Company does not intend to comply with the desires of the Mayor and Council of the Borough of Magnolia, namely, to install sidewalks, curbs, and gutters, and 26 foot compact gravel roadway.¹²⁸

The plat submitted admittedly complied with the requirements of the relevant statute,¹²⁹ but not with the "desires" of the local officials. The court held that "Under this statute a municipality has no power to impose conditions as the approval of a plat plan such as the defendant

¹²⁴ Ibid.

¹²⁵ 210 Mich. 488, 178 N.W. 27 (1920).

¹²⁶ 59 So. 2d 360 (S. Ct. of Fla. 1952).

¹²⁷ 10 N. J. 223, 89 A.2d 664 (1952).

¹²⁸ 89 A.2d 664, at 666.

¹²⁹ R.S. 46: 23-1, N.J.S.A.

municipality attempted in this instance to impose on the plaintiff."¹³⁰ This decision points up the desirability, if not the absolute necessity, of having a specific delegation of authority in the enabling law so that communities can require these various improvements.

A curbs and gutters requirement was also involved in Kesseling v. Wakefield Realty Co.¹³¹ The developer brought suit against the Louisville-Jefferson County Planning and Zoning Commission because it rejected developer's plat on the grounds that it did not conform to a regulation requiring construction of curbs and gutters where the average lot frontage was less than 100 feet. The plan, which substituted "valley gutters," was designed by competent engineers. The Court of Appeals held that valley gutters were a ". . . proper, practicable, and most serviceable means and method of disposing of surface water. . . considering the topography of plaintiff's land,"¹³² and this particular type of gutter would meet the requirements of the regulation. The court's opinion also pointed out that the Planning and Zoning Commission had not required conformity with this rule in several other specified subdivisions.¹³³ Reading this case might lead one to the conclusion that the court here waived, or at least lessened, a requirement. On the other hand it is rather remarkable that the court upheld any curb and gutter requirement since the Planning and Zoning Commission itself had, without authorization, waived the requirement in other instances. But the court upheld a curbs and gutters requirement, relying heavily on the plan and testimony

¹³⁰89 A.2d 664, at 666.

¹³¹306 Ky. 725, 209 S.W. 2d 63 (1948).

¹³²209 S.W. 2d 63, at 64.

¹³³ibid.

of "competent engineers" that the "valley gutter" was a proper method to achieve the stated purpose.

The California cases on drainage fee requirements must be noted. In Kelber v. City of Upland,¹³⁴ the subdivider was required to pay \$1500 into the "Subdivision Drainage Fund" as a condition to plat approval under the local ordinance. The court held this provision to be in conflict with the Subdivision Map Act, stating:

The provisions here in question are not local ordinances regulating the design and improvement of a subdivision as those terms are defined in the act. It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for . . . drainage facilities.¹³⁵

The major factor in the court's decision was the fact that fees so collected would be used throughout the city instead of being limited to a particular development.

City of Buena Park v. Bayor¹³⁶ upheld that a fee requirement of \$50,000 could be exacted to cover the cost of drainage facilities to service the subdivider's land. The court stated that a drainage facility is an improvement which the city could specifically regulate:

The Kelber case does not hold that a requirement of payment for drainage is illegal. On the contrary, it expressly states that it is legal under the Subdivision Map Act but that the requirement under the facts of that case was unreasonable In the instant case the drainage . . . was undoubtedly for the direct benefit of the subdivision in question¹³⁷

¹³⁴ 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

¹³⁵ 155 Cal. App. 2d 631, at 638, 318 P.2d 561, at 565. This is a strained interpretation; see note 68, Chapter VI.

¹³⁶ 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

¹³⁷ Id. at 67-68, 8 Cal. Rptr. at 679.

It must also be noted that the state legislature in 1959 amended the Subdivision Map Act and gave cities express authority to exact, under a local ordinance, a cash payment to cover the pro rata share of drainage facilities required.

The above cases show that in California a developer can either be required to install any necessary drainage facilities or pay a fee in lieu thereof, so long as the money is used for benefit of his particular subdivision.

Sidewalks

Although we can find one fairly recent case, Magnolia Development Co. v. Coles,¹³⁸ holding that sidewalks may not be required as a condition precedent to plat approval without specific statutory authority,¹³⁹ there seems to be more authority on the other side. In Allen v. Stockwell,¹⁴⁰ the court upheld among other provisions in the local ordinance, one requiring sidewalks as a condition precedent. This power was not expressly granted by statute, but was approved by the court as a result of the delegation of home rule powers to the city by the legislature.

In Garvin v. Baker¹⁴¹ we find a decision upholding a requirement for minimum street widths of sixty feet, with an additional six feet on either side required for curbs, gutters, and sidewalks.

¹³⁸10 N. J. 223, 89 A.2d 664 (1952).

¹³⁹89 A.2d 664, at 666.

¹⁴⁰210 Mich. 488, 178 N.W. 27 (1920).

¹⁴¹59 So. 2d 360 (S. Ct. of Fla. 1952).

It is quite possible that sidewalk requirements in many states would not need specific statutory expression if the court's interpretation of streets in Snow v. Johnston¹⁴² controls:

There is nothing to suggest that when the words "avenue" and "streets" were used it was intended thereby to exclude sidewalks. The sidewalk should be considered as a part of the street or avenue.¹⁴³

This writer is unable to state that this interpretation is the prevailing one, but, as the quotation above shows, it certainly has reason on its side.

Utility Services

Subdivision residents, both within and without a town, desire municipal services. Developments on the fringe need municipal services, especially water and sewerage facilities, and also electricity. The availability of water and sewerage services, particularly, is one of the factors that determines the desirability of a particular subdivision from a potential buyers viewpoint. In studies of fringe area developments much has been written ". . . to demonstrate that the city is subsidizing the county and to show that the city dweller is paying for services which he does not receive."¹⁴⁴ In other words, the taxpayers of municipalities have, in the past, borne much of the burden of new subdivision developments, particularly where cities have extended utilities to a subdivision at little or no cost to the developer.

¹⁴²28 S.E. 2d 270 (S. Ct. of Ga. 1943).

¹⁴³28 S.E. 2d 270, at 276.

¹⁴⁴Engelbert, ed. The Nature and Control of Urban Dispersal 89 (1960).

Planners have found that municipal expenses rise on a per capita - per acre basis as water and sewer systems, which are costly facilities to provide, have been extended by cities without cost to developers. This is particularly true when these are extended for excessive distances from central points, perhaps leap-frogging over undeveloped land, and for subdivisions in terrain that is steep, or underlain with solid rock, or otherwise less suitable for development.¹⁴⁵

The controlling factor must be the economical provision of municipal services if they are extended.¹⁴⁶ Generally speaking, towns have only just tried to keep up with the demand for water and sewer, whenever that demand occurs, rather than exerting control over its extension or trying to use the extension of utilities to limit or direct development.¹⁴⁷

Municipally-owned utility systems can be a very effective means of influencing the development of the city and its fringe areas. Since it is extremely costly to serve the scattered and haphazard development which frequently takes place in the outlying areas, cities should utilize their control over municipal water and sewer systems to assure that subdivision developers and/or the property owners pay all -- or a major portion -- of the cost of extending utility service to the subdivision. This would provide higher quality development and relieve the city of the financial burden it would otherwise assume. Almost all cities, large and small, now require this through provisions in their subdivision

¹⁴⁵Cutler, "Legal and Illegal Methods for Controlling Community Growth in the Urban Fringe," 1961 Wisc. L. Rev. 370, 389 (1961).

¹⁴⁶Delafons, Land Use Controls in the United States 66 (1962).

¹⁴⁷Engelbert, supra note 144, at 41.

regulations, or under a local assessment program.¹⁴⁸ It is felt that the use of a local assessment program to achieve this end is less desirable than the vehicle of subdivision regulations, which tends to provide a "complete product" for the buyer with all improvement costs included in his mortgage.

There can be no doubt about the state's power to allow municipalities and counties to require the installation of these facilities by the developer. As Cornick stated, "The State's power to exercise general supervision over matters which are so intimately related to public health as water supply and sewage disposal is well established and has long been used."¹⁴⁹ The following discussion of relevant cases bears this out.

Water

The availability of treated water is the key to the raw land developed around our cities. The city officials who have authority over the city's water system will be able to thus control growth in and around the city if state law permits the counties to regulate the use of wells and pumps. The validity of subdivision regulations requiring the developer to install water mains has been upheld in cases from several states where the requirements of the subdivision regulations was adopted under specific statutory authority.¹⁵⁰ It is also

¹⁴⁸Green, Planning Law VII: 38 (1962).

¹⁴⁹Cornick, Premature Subdivision 235 (1938).

¹⁵⁰Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920); Patterson v. Naperville, 9 Ill. 2d 233, 137 N.E. 2d (1956); Mefford v. City of Tulare, 102 Cal. App. 2d 919, 288 P.2d 847 (1951); Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958).

clear that where a town board is authorized by statute to provide in its subdivision regulations a requirement that developers install water mains in their subdivisions, the board may reject a proposed plan that does not meet the requirements.¹⁵¹

There is a divergence of cases on the question of a municipality's requiring the developer to install mains when the governing state statute is not specific on the point. The court in In re Lake Secor Development Corp.¹⁵² held that where the applicable statute did not employ specific language authorizing such a requirement the town may not require installation of a water system as a condition to plat approval. It was the opinion of the court in this case that such a requirement could not be implied, or read into the statute.¹⁵³

On the other side, Zastrow v. Village of Brown Deer¹⁵⁴ held that, absent specific wording in the statute, the village could require "improvements reasonably necessary," including installation of a water system, built and provided without cost to the village. Furthermore, the village could require construction according to its specifications and under its inspection.¹⁵⁵

In Mefford v. City of Tulare¹⁵⁶ the court upheld a city ordinance requiring water and sewer installation at developers cost that was not based on a specific provision in California's Subdivision Map Act. The Tulare Ordinance provided that subdividers ". . . shall furnish and install

¹⁵¹Se-Frank Developers v. Gibson, 157 N.Y.S. 2d 812 (N.Y.S. Ct. 1956).

¹⁵²In Re Lake Secor Development Corp., 252 N.Y.S. 809 (1931).

¹⁵³Id.

¹⁵⁴9 Wts. 2d 100, 100 N.W. 2d 359 (1960).

¹⁵⁵Id. at 362.

¹⁵⁶102 Cal. App. 2d 919, 228 P.2d 847 (1951).

their own sewer and water facilities within the boundaries of the subdivision at the expense of the owner or subdivider."¹⁵⁷ Mafford, owner of a thirty-eight acre tract in the city, took no action to comply with the ordinance, and in the lower court test the ordinance was declared null and void because it required a condition not specifically mentioned in the State Statute.

On appeal the ordinance was found to be "a valid exercise"¹⁵⁸ of municipal authority. The court found that "... in respect to municipal affairs the city is not subject to general law except as the charter may provide,"¹⁵⁹ and that there were no provisions in the city charter to prevent passage of the ordinance.¹⁶⁰ The court, in reversing the lower court judgment, held:

It is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinance and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.¹⁶¹

Not all towns require the developer to pay the full cost. Many arrangements are possible. Some towns, for instance, will provide the labor for installation if the developer provides the materials. Some towns extend mains at their expense. Other cities, in an attempt to make their requirements more acceptable, have agreed to refund to the developer a certain portion of the revenue from the tap-on fees which the city receives from the subdivision he developed. This portion

¹⁵⁷Ordinance #572, City of Tulare.

¹⁵⁸228 P.2d 847, 849 (1951).

¹⁵⁹*Id.* at 850.

¹⁶⁰*Id.* at 851.

¹⁶¹*Ibid.*

varies, of course, and may be from fifty to seventy-five per cent of the installation cost, and the developer is paid back over a period of time, usually not more than ten years, often less.

Since the developers usually charge the cost of the water system -- as well as all other improvements -- to the lot buyer, why should a town give any refund to the developer? It would seem that where towns give partial refunds, the officials are unaware of who really pays for the utility extension, or they provide the refund in order to soften the effect of subdivision regulations on the developers and thus preclude their often very strong opposition to the subdivision regulations and to those responsible for their adoption.

There is one interesting case on cost-sharing for utility extension, and that is Lake Intervale Homes, Inc. v. Parsippany-Troy Hills.¹⁶² In this case the New Jersey Supreme Court affirmed a lower court judgment awarding \$6,000 to the plaintiff as a refund. The court held that in the absence of standards relating to the imposition of costs of extending water mains under a subdivision regulation, and the insistence that the subdivider bear the total cost, regardless of benefits conferred by the improvement, produced an arbitrary situation entitling the developer to a refund of costs over and above his "proportionate share."¹⁶³

In any event, it appears that more and more towns, reasoning that the lot purchaser and not the subdivider pays for installation of improvements, are abandoning the policy of providing partial refunds to developers.

¹⁶²28 N.J. 423, 147 A.2d 28 (1958).

¹⁶³147 A.2d 28, at 32.

Sewer

Water and sewer facilities are basically so similar that most ordinances and subdivision regulations that require one require both, and the courts passing on the validity of regulations requiring the installation of both have come to view them in approximately the same way.

A municipality may require a developer to install sewer lines as well as water mains. Given a carefully worded enabling statute and a local subdivision ordinance based on that statute, there is no doubt that sewer installation at developer expense can be required. As the Mefford¹⁶⁴ case shows, such requirements have been upheld in the absence of a carefully worded statute, and in Allen v. Stockwell¹⁶⁵ the installation of sewers was required, not under enabling legislation, but under general home rule authority. Here the Michigan Supreme Court held that a county has the right to insist on the installation of sewers as a condition to plat approval.

In this area, as in the requirement that water systems be installed, the various courts have taken one of two positions: they have either held a requirement in a particular case not founded on a statutory provision,¹⁶⁶ or they have upheld such requirements, under liberal statutory interpretation, apparently persuaded of the dire necessity for such systems.¹⁶⁷

In hewing to the latter interpretation the courts have a

¹⁶⁴102 Cal. App. 2d 919, 228 P.2d 847 (1951).

¹⁶⁵210 Mich. 488, 178 N.W. 27 (1920).

¹⁶⁶ibid.

¹⁶⁷Mefford v. Tulare, supra note 164.

sounder position, and a wiser one. Taking the public health approach and thus relying on the police power, the state through its counties and/or cities can preclude subdivision in unsatisfactory sites. This would be based on a finding that (1) the water supply was unpotable or that (2) the soil was not suited to septic tanks, because of impermeability. If soil conditions or other factors make the use of septic tanks "... a probable present or future threat to health, under its police power a municipality clearly can prohibit subdividing"¹⁶⁸ It can also deny building permits for previously platted land until sanitary sewers are provided.¹⁶⁹ Cutler states, and this writer is in agreement with him, that under unstable soil conditions septic tanks clearly create a nuisance,¹⁷⁰ because of the noxious odors involved. Further than that, use of septic tanks in soil unsuited for them has very often led to the dangerous situation of having overflow from the tanks standing on the ground, because of impermeable soil.

Many states, recognizing the possible health problems involved, have enacted legislation requiring the approval of health officials as a condition of plat approval. The state legislation of New York, for example, passed such a law in 1933.¹⁷¹ This law required that

. . . before land platted for subdivision can be offered for sale, and before permanent buildings can be erected thereon, the plats must be submitted to the State Commission of Health for approval, together with detailed information concerning the methods proposed for supplying the subdivision with potable water, and for disposing of sewage.¹⁷²

¹⁶⁸City of Nokomis v. Sullivan, 14 Ill. 2d 417, 153 N.E. 2d 48 (1958).

¹⁶⁹Cutler, "Legal and Illegal Methods for Controlling Community Growth in the Urban Fringe," 1961 Wisc. L. Rev. 370, at 401 (1961).

¹⁷⁰Ibid.

¹⁷¹Ch. 403, N.Y. Laws of 1933.

¹⁷²Cornick, supra note 149, at 235.

This requirement was tested in Gulino Constr. Corp. v. Hilleboe,¹⁷³ and the court sustained the Public Health Law and upheld the rejection of a proposed plat that did not reasonably comply with the rules of the State Health Department.

Septic tanks provide a generally poor means of sewage disposal in an urban area. Unfortunate experience in fringe areas across the country over the past several years are proof enough. Awareness of the importance of adequate waste disposal facilities and the problems occasioned otherwise may lend a certain liberal tone to a court determining whether requirements that developers provide adequate sewerage can be implied from a statute, if not expressly provided.

One significant point in connection with utility installation has been occasioned by annexation of subdivisions wherein the developer installed the required facilities. The basic case is City of Danville v. Forest Hills Development Corp.¹⁷⁴ an action in which the developer attempted to recover costs of water and sewer and certain other improvements upon annexation by the city. The Forest Hills Corporation had acquired and developed a tract of land contiguous to Danville. Streets, sidewalks, water, gas, and sewer mains were provided, as were hydrants, electric lines, and street lighting equipment. Later the city annexed the development, and the developer sued to recover the value of all the improvements, save streets and sidewalks. The court here held that the corporation made the improvements as an inducement to purchasers to buy lots in the subdivision:

¹⁷³ 167 N.Y.S. 2d 787 (1956).

¹⁷⁴ 165 Va. 425, 182 S.E. 548 (1935).

When the Forest Hills Development Corporation constructed the improvements on the property in question, it was done in order to make the lots in the development more saleable. . . . The Corporation did not, and could not have expected to, derive any revenue for the gas, water and electricity furnished to its purchasers by the city. . . . on the other hand, the corporation was relieved of the cost of future maintenance of the facilities mentioned. . . . The Corporation was also relieved of the expense of lighting its streets and the water supply to its hydrants, which it had to pay the city before the annexation.¹⁷⁵

The court held that the Corporation was not entitled to recovery because it did not own these facilities, anyway, but had dedicated them to the use of the lot owners in the subdivision. The court concluded that the corporation had doubtless included the cost of the improvements in the prices charged for the lots sold.¹⁷⁶

There have been a few cases contrary to Danville,¹⁷⁷ but it is thought to control. Cases in most jurisdictions are similar in decision and reasoning.¹⁷⁸

The major significance of these cases, particularly Danville¹⁷⁹ and Ford Realty,¹⁸⁰ is the court's recognition of who really pays for

¹⁷⁵182 S.E. 548, at 549.

¹⁷⁶182 S.E. 548, at 551.

¹⁷⁷This writer finds four vintage cases, all in North Carolina, each holding that in the absence of a statute providing that developer-installed water and sewer lines become city property upon annexation, the taking of them is an act for which the city must compensate the developer. Jackson v. City of Gastonia, 98 S.E. 2d 444, 246 N.C. 404, (1957); Stephens Company v. City of Charlotte, 201 N.C. 258, 159 S.E. 414 (1937); Abbott Realty Co. v. Charlotte, 198 N.C. 564, 152 S.E. 686 (1930); Spaugh v. City of Winston-Salem, 234 N.C. 708, 68 S.E. 2d 838 (1952).

¹⁷⁸Ford Realty & Construction Co. v. Cleveland, 30 Ohio App. 1, 164 N.E. 62 (1928); Country Club District Service Co. v. Village of Eding, 124 Minn. 26, 8 N.W. 2d 321 (1943); Suburban Real Estate Co. v. Incorporated Village of Silverton, 31 Ohio App. 452, 167 N.E. 474 (1929).

¹⁷⁹Supra, note 174.

¹⁸⁰Supra, note 178.

subdivision improvements. In these two cases, long decided, the courts very clearly saw that it is the purchaser of a lot or a house who pays the costs, and not the subdivider.

Performance Bonding

Over the past several years, local governments have increasingly relied on the performance bond to assure that new subdivisions will be properly improved. The usual practice in the past has been for cities and counties to require the necessary improvements in a development to be made prior to plat approval. Developers have often contended that this places an onerous financial burden on them because of the high capital outlay required for grading and paving streets, installing curbs, gutters, sidewalks, and utilities. In an effort to make life easier for the developers, yet guarantee that the improvements will be made, as required, the governments have come to the conclusion that performance bonding is an excellent solution to the problem. Allowing a performance bond is a favor to developers, a privilege extended by the municipality.

It has been held that a planning board may waive the completion of required improvements for plat approval if a performance bond is filed,¹⁸¹ thus guaranteeing the improvements and relieving the municipality or county of providing them should the developer fail to do so. It has been held that the proper purpose of performance bonds is not to punish the developer for failure to make the required improvements,

¹⁸¹Pennyton Homes Inc. v. Planning Board of the Borough of Stanhope, 197 A.2d 870 (N.J. 1964).

or to unduly benefit a local government, but to assure those who purchase homes in a new subdivision that they will receive the public improvements that were a large part of the inducement to purchase lots and/or homes in that development.¹⁸² In other words, the municipality or county, by relying on the performance bond technique, still assures the purchaser that he will get a "complete product." And although the governmental unit is not to unduly profit, utilization of this device can assure that it will not be unduly burdened either. University City ex rel. Mackey v. Frank Micelli & Sons Realty & Building Co.¹⁸³ holds that the purpose of such bonds is also - and primarily - for the financial protection of the city (or county), and not the lot owners.

The use of the performance bond technique will also act to encourage the better developers and to weed out the less desirable ones. This is so because a bonding house is engaged in a business and will obviously seek to minimize its risks, as do all businesses, including land subdividers. To minimize its risks the bonding house will issue bonds only to persons whom it considers good risks.

A number of factors will be considered in the determination of a good risk: The builder's past record for fulfilling his contracts; the extent of his liquid and fixed assets; whether or not he owns the land that is being developed; and sometimes the nature of the local housing market.¹⁸⁴

Consideration of these factors will doubtless mean that some developers will not be able to provide a performance bond, and, therefore, must make the required improvements in order to attain plat approval. Otherwise,

¹⁸²Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

¹⁸³347 S.W. 2d 131 (1961).

¹⁸⁴American Society of Planning Officials, Performance Bonds for the Installation of Subdivision Improvements I (Public Advisory Service Rep't No. 48, 1953).

they will not be able to develop the tract. It also means that a developer wishing to post a performance bond rather than install the required improvements must, in addition to complying with the local government's conditions, also meet the requirements of the financial institution whose funds he seeks.

One can also see very readily that a city or county, though not strictly engaged in a business, as such, is concerned with costs and with risks. The local governing body generally wishes to avoid risking funds in connection with a new development, though it may put up funds for improvements, which funds are to be amortized later by taxes, service charges or special assessments. These methods have not always been satisfactory, however.

Historically, the risk to the community has occurred when and after plats are recorded. Historically, cities have inherited premature subdivisions and residential areas devoid of paved streets, storm and sanitary sewers, and water supply structures, or premature subdivisions with paved streets and other structures subject to uncollectable special assessments.¹⁸⁵

The result, then, has often been that city taxes have to go up, in order to take care of these situations, and the general taxpayer is again subsidizing inadequately improved development.

The municipality or county does have a certain obligation to a new subdivision, because it becomes a part of that city or county. The local government should not, however, wish to carry out its obligations under conditions that would result in its accruing an undue financial burden or a loss.

¹⁸⁵ibid.

Consequently, the local governing body, in granting to the developer the privilege of recording his plat, extracts from him certain performances or promises to perform which will minimize the risk of the new development to the community as a whole. . . .¹⁸⁶

The performance, or promise to perform, which is indicated by the bond, should result in the new subdivision¹ becoming a real asset to the community, rather than a liability, either financial or otherwise.

There should be, for better results, specific statutory authorization to permit the local government unit to allow filing a performance bond to guarantee improvements in lieu of actual installation prior to plat approval. Permitting a performance bond in lieu of improvements has been held null and void in one case, Magnolia Development Company, Inc. v. Coles,¹⁸⁷ but in this case the court held that under the statute involved, the municipality had no power to require the improvements in question,¹⁸⁸ much less require a surety bond for their completion.

On the other hand, several cases uphold the validity of permitting performance bonds, where authorized by statute.¹⁸⁹ Some of the courts, in other cases, have gone so far as to hold that it is only logical to allow cities to permit a bond guaranteeing that the required work will be completed.¹⁹⁰

One problem that a few cities employing the performance bond

¹⁸⁶*Ibid*, at 2 (Emphasis supplied).

¹⁸⁷10 N.J. 223, 89 A.2d 664 (1952).

¹⁸⁸"Sidewalks, curbs and gutters and 26 foot compact gravel roadway." *Id.* at 666.

¹⁸⁹Ragghianti v. Sherwin, 16 Cal. Rptr. 583 (1961); Morro Palisades Company v. Hartford Accident & Indemnity Co., 52 Cal. 2d 397, 340 P.2d 628 (1959); Gordon v. Robinson Homes, Inc., 174 N.E. 2d 381 (1961).

¹⁹⁰Hoover v. Kern County, 118 Cal. App. 2d 139, 257 P.2d 492 (1953); Enola v. Wendt. Constr. Co., (Cal. App.) 388 P.2d 498 (1964).

technique have encountered is allowing filing of bond insufficient to cover the cost of the work to be done. One cannot reasonably expect to go back and compel the developer to post additional bond in such circumstances. The courts have held that, even though the initial bond posted was insufficient to cover the cost involved, the town or county cannot compel the developer to put up additional bond. In a recent case, McKenzie v. Arthur T. McIntosh & Co.,¹⁹¹ the developer posted bond in an amount equal to the cost of street construction, as estimated by a professional engineer. The amount was grossly inadequate but when the county highway supervisor later brought suit to compel posting an additional amount the court denied relief. The lesson there is that the city or county should make sure its cost estimate is accurate.

A variation on the performance bond technique that is sometimes used allows the developer to make a cash deposit, or turn over a certified check to the local governing body.¹⁹² Utilization of either of these methods achieves the same objective as does use of a performance bond. It is not as widely used as a performance bond, however, for an obvious reason: It requires considerable cash outlay by the developer. The advantage of the performance bond technique to the subdivider is that it does not require such a large outlay of funds.

One method sometimes used is a contract between developer and city or county, executed prior to plat approval. This is not guaranteed to produce the same effectiveness as a performance bond, though, and is

¹⁹¹200 N.E. 2d 138 (1964).

¹⁹²Buena Park v. Boyar, (Cal. App.) 8 Cal. Rptr. 674 (1960); Cammarano v. Borough of Allendale, 65 N.J. Super. 240, 167 A.2d 431 (1961).

not as desirable as a method to insure improvements. Stoneham v. Savello¹⁹³ is a case in point. Here the subdivider contracted with the town, as a condition of plat approval, to install certain facilities in his development. This particular developer lacked the access to public ways necessary for such installation, and plead this as a defense in the suit. The court, of course, held that this did not relieve him of his contractual obligations. The court concluded that the town could recover damages from the developer in the amount it would cost to make the required installation.

Now, if the contracting subdivider is solvent at the time the judicial decision is made, fine. There is a distinct possibility, however, that he may not be financially capable of paying the town for the cost of the work. In other words, in using this approach the question is whether or not the town can collect on a judicial decree, after the fact. Will the developer still be on the scene? Will he be solvent? The existence of these questions illustrates the advisability of using the performance bonding technique, rather than a plain contract. If a performance bond is filed and the work is not completed by the developer, the town has enough money, presumably, to pay the cost, regardless of the fate of the subdivider.

Conclusions are that many developers do not particularly like to use performance bonds, perhaps because of difficulty in obtaining them, but they are definitely workable as an alternative to actual installation prior to plat approval. Such bonds are more easily obtained where the market is good, and by developers with good reputations.¹⁹⁴

¹⁹³170 N.E. 2d 417 (Mass. 1960).

¹⁹⁴ASPO, supra note 184, at 9-20.

The performance bonding technique, no longer on the fringe of legal acceptability, should be increasingly utilized by local governments. It is a good method that reduces the financial burden on developers and can eliminate the need for a city or county to assume the risk of undue financial participation in a new subdivision. As indicated in Performance Bonds for the Installation of Subdivision Improvements, "It is illogical for the government to assume the risk for which the developer receives payment."¹⁹⁵

Requiring Unnecessary Improvements

It is definitely possible to have unnecessary improvement in a subdivision, both in terms of items and extent. One of the great sins of extent occurs with reference to streets, and sidewalks sometimes provide an example of a needless item.

Streets

Two things are responsible for putting more land than is necessary or desirable into streets in a new subdivision. Developers too often insist on providing as many small lots as possible, thus necessitating lots of street mileage. Then the purchasers will buy more than one lot, since they are so small, for building purposes. This, of course, means that a considerable portion of the subdivision's streets are unnecessary. Furthermore, they are costly to maintain and to repair. The use of the grid pattern has been responsible

¹⁹⁵ ibid., at 21.

for much of this waste occasioned by unnecessary amount of street right-of-way, grading, paving, and other improvements. The FHA's Planning Profitable Neighborhoods¹⁹⁶ illustrates very clearly how FHA, in its review of subdivision plats, can give the developer a better design at lower cost, by reducing the amount of land used for streets.

Fred Bair had the following comment to make on the subject of unnecessary streets.

One of the most expensive mysteries of our time is why developers in the past (and a good many in the present) put so much land into unnecessary streets. The same developers quite frequently argue long and plaintively that they can't afford to make lots a decent size.¹⁹⁷

Mr. Bair goes on to provide an example, a town in which there are 176 300' x 230' blocks that "... march with monotonous regularity up and down and across a 491 acre square."¹⁹⁸ Each block has a 30' x 300' alley, abutted on each side by five 60' x 100' lots. All streets are platted at 90' wide. The following table indicates the acreage and percentage for street and other uses.

Horrible Example

<u>Use</u>	<u>Acres</u>	<u>Percent</u>
Lots	242.4	49.3
Streets and alleys	229.1	46.6
School grounds	7.8	1.6
Parks and squares	9.8	2.0
Cemetery	<u>2.4</u>	<u>0.5</u>
Totals	491.5	100.0

SOURCE: Bair, Bair Facts 1960

¹⁹⁶FHA Tech. Bull. No. 7 (1939).

¹⁹⁷Bair, Bair Facts 104 (1960).

¹⁹⁸Ibid.

Mr. Bair points out that things are not as bad as one might assume from the table. This is true because few people bought only one lot, a little less than half the blocks have been built on, and many of the streets have not been opened or have not been paved. So a program of extensive replatting and minor street closing could head off a lot of future expense.

The fact is, however, that the "horrible example" has ten lineal miles of alleys and nearly eighteen lineal miles of streets -- to serve a town about three-quarters of a square mile in area.¹⁹⁹ This means that about ninety acres designated for streets and alleys in this town have been wasted, and wasted in such a way as to constitute a serious and continuing drain on municipal finances.²⁰⁰

This extreme example shows how the two culprits -- the developer who wants to squeeze in as many lots as possible, and the ubiquitous old grid pattern for street layout -- have caused many subdividers to realize a smaller profit than they might have attained, and have caused many of our cities and their suburbs to end up possessing several miles of unnecessary minor streets, which are expensive to build, expensive to maintain, and of very limited utility.

It is encouraging to note that some of the more significant newer ideas relating to land use regulation relate to the concept and planning of the street. In the thinking of today's planners -- if not all of today's subdivision developers -- a street is not just a street, period. It may be an arterial highway, a major thoroughfare, a collector

¹⁹⁹Id. at 105.

²⁰⁰Id.

street, a local service street -- or even a pedestrian mall. Mabel Walker is optimistic about our possibilities.

In breaking away from the rigid gridiron pattern of the past and designing the type of street suited to the particular function it is to serve, radical new possibilities are offered of utilizing urban land more economically and at the same time offering greater amenities to the local residents.²⁰¹

One must keep in mind, however, that city planners do not, in most instances, actually design subdivisions. It is a surveyor or an engineer who lays out the street pattern, all too often with the object still being to cram in as many lots as possible. The continuing education program that most planning commissions carry on with developers as they review their plats is one factor working toward better layout of streets.²⁰² A well-devised subdivision ordinance is another.

Sidewalks

Sidewalks are not absolutely necessary in all subdivisions. Whether or not they are an essential improvement depends on the character of the development.

The average subdivision with average size lots will need and should definitely have sidewalks. A high cost development with either "snob zoning" or restrictive covenants that fix large lot sizes will not require and should not have sidewalks. The validity of this position

²⁰¹Walker, "Land Use and Local Finance," Tax Policy 12 (1960).

²⁰²It has been this writer's personal experience that an increasing number of subdivision developers use the preliminary plat review as a means of getting a planner to provide them a good street design, particularly where they do not have access to a good designer.

has not always been accepted, however, as seen in another example from Mr. Bair:

In a south Florida city, a new subdivision will have sidewalks whether residents of the area want them or not. It appears . . . that in an area of large lots bordering minor streets, homeowners don't want the sidewalks because they wouldn't use them. Understandably enough, they don't want to pay for them, either.

The city fathers have decided that they will have sidewalks and pay for them and like it, or at least that they will have them and pay for them.²⁰³

Mr. Bair goes on to say that, among other things, bird baths are ornamental too, as well as expensive, and perhaps fully as desirable as sidewalks in this particular development.

The question as to where one draws the line on lot size and the necessity of sidewalks may be raised. In answer, it seems obvious that a development of five-acre lots does not need sidewalks; they would not be used. It is this writer's feeling that in subdivisions with lots under two acres in size sidewalks should be required.²⁰⁴ Sidewalks seem unnecessary when the lot size is two acres or more. Whether sidewalks could be omitted for a subdivision with lots of, say, one acre is a matter that should be determined locally, depending on the circumstances.

Curbs

Curbs may not be necessary in low-density districts. The need would hinge on the kind of terrain involved, and thus whether or not a runoff or drainage problem could exist.

²⁰³Bair, *supra* note 197, at 21.

²⁰⁴This writer can state from experience that for a subdivision with average size lots, sidewalks are not unnecessary improvements. Sidewalks are vitally needed to keep youngsters out of the street and out of danger.

Storm sewers

Whether or not storm sewers are absolutely necessary may depend again on the type of development proposed and the kind of terrain involved. Conceivably a low-density subdivision in a relatively flat area would not require storm sewers. But, if this area were subject to heavy rains, how could the water be carried off? And what about later subdivisions in the area and their drainage? A general drainage plan, like a general street plan, would be most helpful.

Sewers

One might carry forward the reasoning here and conclude that connection to a sewerage system is not really necessary for a development of large lots. The Urban Land Institute says, for example, that substantial economies may be realized by waiving certain improvements, such as "... sanitary sewers, storm sewers, sidewalks, curbing and grass strips. . . ." ²⁰⁵ and that these improvements may safely be eliminated in low density districts. This writer does not take exception to the idea that the improvements named, except for sanitary sewers, might properly be waived under the right circumstances.

Considering a low-density residential development as an isolated area one might conclude that connection to a sewerage system is not vital, that septic tanks could be sufficient. There is one problem, though, and that is the question whether the soil involved is of such type as to adequately handle this method of disposal.

²⁰⁵Urban Land Institute, The Effect of Large Lot Size on Residential Development 8 (Tech Bull. No. 32, 1958).

The greatest problem, however, is that one cannot consider a particular subdivision isolated from the rest of the area. Likely there will be development on all sides of this "estate-type" tract, development that will not have such large lots, and which will need to be connected to a sewerage system. For this reason, provision for sewerage systems should not be considered an unnecessary improvement. Septic tanks are for rural areas, and can only be considered a temporary expedient for urban or suburban development.

The point is that the subdivision regulations and municipal policy should be flexible enough to avoid forcing developers - or the city - to make unnecessary and unwanted improvements, without regard to the fact that types of developments vary.

Costs the Developer Should Bear for Required Improvements

In addition to his original investment in the land, the subdivider should pay for a survey and plat of the area, and he should pay any unpaid taxes or special assessments, and he should put in all utilities and make all improvements needed and required.²⁰⁶

The question is, just what improvements are necessary? The American Society of Planning Officials' suggested state subdivision statute²⁰⁷ calls for these improvements:

The municipality or county shall not approve the final plat of any subdivision unless all streets shown on the plat have been suitably graded and paved, and sidewalks, street lighting, water mains, sanitary sewers, and storm

²⁰⁶Mell, "Subdivision Control in Wisconsin," 1953 Wisc. L. Rev. 434 (1953).

²⁰⁷Model State Subdivision Control Law 1947.

drains or combined sewers have been installed in accordance with standards, specifications, and procedure acceptable to the appropriate officials of the municipal corporation or county.²⁰⁸

The costs involved in providing these improvements are usually considerable, and although the courts have held that the cost of providing required improvements is no bar to their validity,²⁰⁹ the developers have not been unduly happy about accepting these conditions when imposed by local governments.²¹⁰

More and more local governments are requiring the developers to provide more and more of the improvements listed in the Model State Subdivision Control Law. One finds that, in California, beginning just prior to World War II,

. . . and becoming almost universal thereafter has been the transfer of cities. . . of capital costs for new neighborhood improvements and services to the land developer who wished to record a subdivision tract map, and subsequently, to the lot purchaser.²¹¹

The extent to which developers across the country are being required to improve their subdivisions is illustrated by the following tables.

Table 2 provides findings from a survey of 95 municipalities in the 17-county area of New York, New Jersey, and Connecticut conducted by the Regional Plan Association of New York. It shows the percentage of the reporting municipalities requiring installation of improvements by developers, by the municipality, or by some other method, including special districts and benefit assessments.

²⁰⁸Id. at 2.

²⁰⁹Petterson v. Naperville, 9 Ill. 233, 137 N.E. 2d 371, 380 (1956).

²¹⁰See the Cases on Conditions Precedent in this chapter.

²¹¹Engelbert, ed., The Nature and Control of Urban Dispersal 45 (1960).

TABLE 2

Subdivision Improvement Requirements in
95 Municipalities in the New York Metropolitan Area, 1951
(Per cent of Municipalities)

<u>Type of Improvement</u>	<u>Required of Developers</u>	<u>Provided by Municipality</u>	<u>Financed by Other Method or Not Required</u>
Street grading	97%	1%	2%
Pavement	86	6	8
Curbs	74	2	24
Gutters	62	3	35
Sidewalks	64	2	34
Water mains	67	12	21
Sanitary sewers	61	6	33
Storm water drains	82	7	11
Fire hydrants	42	43	15
Street lights	13	59	28
Street trees	39	28	33
Recreation areas	38	18	44

SOURCE: Regional Plan Association, Subdivision Requirements, 1952.

Two surveys of a similar nature have been carried out by the Urban Land Institute, one of them in 1950 and one in 1955. These are particularly valuable because they include cities throughout the country and, since the data are comparable, they indicate trends in municipal policy.

The 1950 survey included 98 cities of 50,000 or more population. The 1955 survey was based on replies from 115 such cities. Table 3 compares the summary findings. It shows the percentage of the reporting municipalities in 1950 and in 1955 requiring installation of subdivision

Improvements at the expense of developers. It is notable that for five of the seven types of improvements the percentages of municipalities requiring installation by developers are higher in 1955 than in 1950. This is a trend which will certainly continue.

TABLE 3

Municipalities Requiring Developers to
Install Subdivision Improvements
98 Municipalities in 1950 and 115 Municipalities in 1955
(Per cent of Municipalities)

<u>Type of Improvement</u>	<u>1950</u>	<u>1955</u>
Street grading	87%	90%
Street paving	74	75
Curbs and gutters	82	78
Sidewalks	84	74
Water mains	44	60
Sanitary sewers	75	78
Storm sewers	64	71

SOURCE: Urban Land Institute, Who Pays for Street and Utility Installations In New Residential Areas (Tech Bull. No. 13, 1950); Utilities and Facilities for New Residential Development: A Survey of Municipal Policy (Tech Bull. No. 27, 1955).

The survey also indicated that in 77 per cent of the cities in 1950 and in 64 per cent of the cities in 1955 the developer was not reimbursed for any of the installation costs of these improvements. An examination of the detailed, city-by-city notes of the 1955 report reveals that in those communities reimbursing the developer most of the payments were for a portion of the cost of water mains and were usually made when a specified percentage of the lots were built on and connections made to the water supply system.

The 1955 Urban Land Institute survey also covered 43 urban counties having a population of over 100,000, 38 of which had subdivision regulations in force. Apparently the remaining 5 had subdivision control powers conferred by statute or charter although they had not yet adopted formal regulations. Table 4 is based on a portion of the summary table from the Urban Land Institute report.

TABLE 4
Subdivision Improvement Requirements of
43 Urban Counties in 1955

Type of Improvement	Number of Counties Requiring Developer to Pay Improvement Costs			
	All	Part	None	No Reply or Not Applicable
Street grading	39	0	1	3
Street paving	36	0	1	6
Curbs and gutters	33	0	5	5
Sidewalks	31	0	7	5
Water mains	28	3	4	8
Sanitary sewers	29	1	4	9
Storm sewers	27	2	3	11

SOURCE: Urban Land Institute, Utilities and Facilities for New Residential Development: A Survey of Municipal Policy (Tech. Bull. No. 27, 1955).

In 1955 the Institute of Public Service of the University of Connecticut conducted a survey of subdivision improvement requirements in 82 towns and cities and 3 boroughs. The results are of particular interest because they were reported by community size. Table 5 shows the percentage of Connecticut communities in each population category to which the developer is required to pay the entire cost for various type of improvements.

TABLE 5

Subdivision Improvement Requirements for
85 Communities in Connecticut, 1955
(Per cent of Communities Requiring Developer to
Pay Total Costs of Improvements)

Type of Improvement	Size of Community				
	Below 2,000	2,000- 5,000	5,000- 10,000	10,000- 50,000	50,000 & Over
Street grading	86%	90%	94%	91%	100%
Street paving	69	76	82	82	80
Curbs	90	92	71	85	83
Gutters	85	84	71	80	100
Sidewalks	100	86	73	90	80
Sanitary sewers -					
Trunk lines	100	91	80	55	50
Lateral extensions	75	100	90	94	83
Storm sewers -					
Trunk lines	100	81	64	83	67
Lateral extensions	20	92	93	83	83
Water mains	100	92	75	95	60

SOURCE: Institute of Public Service, University of Connecticut,
Regulating and Financing Residential Subdivision Development in
Connecticut Towns and Cities, 1955.

It is notable that even in the smallest communities developers were required to install these improvements, with the exception of lateral extensions of storm sewers, in a very high percentage of the towns reporting. Comparable data from an earlier survey by the Institute

in 1950 revealed that in all categories of improvements a higher percentage of municipalities in 1955 were requiring installation by developers than was the practice five years earlier.

A similar survey was carried out in Virginia in 1955 by the League of Virginia Municipalities. This study revealed that practices of Virginia communities varied, depending on the location of the subdivisions. In this state, where cities commonly exercise extraterritorial jurisdiction over subdivisions beyond the corporate boundaries, developers outside the city are required to pay for more of the improvements than developers inside the city limits.

Table 6 shows the percentages of the 59 reporting municipalities requiring developers to pay all, part, or none of the costs of improvements inside and outside the corporate boundaries.

TABLE 6
Subdivision Improvement Requirements for
59 Virginia Municipalities, 1955

<u>Type of Improvement</u>	Percentage of Municipalities Requiring Developer to Pay for Improvements					
	<u>Inside City Limits</u>			<u>Outside City Limits</u>		
	<u>All</u>	<u>Part</u>	<u>None</u>	<u>All</u>	<u>Part</u>	<u>None</u>
Street grading & paving	47%	22%	31%	98%	2%	0%
Curbs and gutters	40	26	34	98	2	0
Sidewalks	43	46	11	98	2	0
Water mains	49	15	36	81	12	7
Sewers	46	29	25	96	2	2

SOURCE: League of Virginia Municipalities, Report No. 378, 1955.

In 1956 the Institute of Government of the University of North Carolina reported the findings of a study of subdivision Improvement requirements in 30 North Carolina cities over 10,000 population. Table 7 summarizes the data. Not all of the cities reported information, and the table indicated for each type of improvement the number of cities supplying information.

TABLE 7

Subdivision Improvement Requirements in
30 North Carolina Cities Over 10,000, 1956

<u>Type of Improvement</u>	<u>Cities Reporting</u>	<u>Percentage of Cities Requiring Developer to Pay for Improvements</u>		
		<u>All</u>	<u>Part</u>	<u>None</u>
Street grading	24	88%	8%	4%
Street paving	22	41	50	9
Curbs and gutters	23	65	31	4
Sidewalks	23	78	18	4
Water mains	23	57	4	39
Sanitary sewers	23	57	4	39
Storm sewers	24	75	12-1/2	12-1/2

SOURCE: Wicker, "Financing Local Improvements in North Carolina Cities over 10,000" Popular Government 1956.

The Tennessee State Planning Commission carried out a comprehensive survey of improvement requirement practices in cities of that state in 1957. Tables 8 and 9 show the results summarized from the replies of 89 cities. Table 8 is for subdivisions inside corporate boundaries, and Table 9 shows comparable information for subdivisions outside the city. Since not all cities reported information on all items, the tables indicate the number supplying information about each type of improvement.

TABLE 8

Subdivision Improvement Requirements for
Developments Within Corporate Boundaries
in 89 Tennessee Cities, 1957

<u>Type of Improvement</u>	<u>Cities Reporting</u>	<u>Percentage of Cities Requiring Developer to Pay for Improvements</u>		
		<u>All</u>	<u>Part</u>	<u>None</u>
Street grading	48	88%	2%	10%
Street paving	43	73	7	20
Curbs and gutters	20	70	10	20
Sidewalks	19	79	5	16
Water mains	44	73	7	20
Sanitary sewers	35	66	14	20
Storm sewers or drainage	38	82	2	16
Street markers	26	73	0	27
Lot markers	31	81	0	19

SOURCE: Tennessee State Planning Commission, Subdivision Improvement Costs: Who Pays for What, 1958.

TABLE 9

Subdivision Improvement Requirements for
Developments Outside Corporate Boundaries
in 89 Tennessee Cities, 1957

Type of Improvement	Cities Reporting	Percentage of Cities Requiring Developer to Pay for Improvements		
		All	Part	None
Street grading	25	100%	0%	0%
Street paving	21	86	14	0
Curbs and gutters	10	90	10	0
Sidewalks	10	90	10	0
Water mains	21	86	9	5
Sanitary sewers	15	93	0	7
Storm sewers or drainage	16	94	6	0
Street markers	12	92	0	8
Lot markers	16	94	0	6

SOURCE: Tennessee State Planning Commission, Subdivision Improvement Costs: Who Pays for What, 1958.

One sees from Tables 8 and 9 that the situation in Tennessee was very similar to that in Virginia, with greater requirements placed on developers operating outside the corporate limits.

The most comprehensive survey of this type, in terms of number of communities, was prepared by the International City Managers' Association in 1958. The study included 692 cities over 10,000 population having land subdivision regulations. Of these, 615 required developers to install one or more types of improvements in new developments. Table 10 shows a summary of the findings.

TABLE 10
 Subdivision Improvement Requirements for
 692 Cities Over 10,000 in 1958

<u>Type of Improvement</u>	<u>Cities Requiring Installation at Developer's Expense</u>	
	<u>Number</u>	<u>Percent</u>
Street grading	437	63%
Street grading & surfacing	505	73
Curbs and gutters	454	66
Sidewalks	323	47
Water mains	516	75
Sanitary sewers	539	78
Storm sewers	443	64
Street trees	131	19
No Improvements required	77	11

SOURCE: International City Managers' Association, The Municipal Year Book 1958.

To permit a more direct comparison with the earlier Urban Land Institute survey which included information only from cities of 50,000 or more, Table II was prepared. This shows data for the 155 cities of 50,000 or more population in 1958 that had subdivision regulations and responded to the ICMA questionnaire.

TABLE II

Subdivision Improvement Requirements for
155 Cities 50,000 and Over in 1958
Having Subdivision Regulations

<u>Type of Improvement</u>	<u>Cities Requiring Installation at Developer's Expense</u>	
	<u>Number</u>	<u>Percent</u>
Street grading	105	68%
Street grading and surfacing	116	75
Curbs and gutters	105	68
Sidewalks	76	49
Water mains	113	73
Sanitary sewers	120	77
Storm sewers	103	66
Street trees	27	17

SOURCE: International City Managers' Association,
The Municipal Year Book, 1958.

Table 12 shows the same information as Table 11 for the 364 cities of 10,000 to 25,000 population having subdivision regulations in 1958 and reporting to the ICMA.

Table 13 provides information on required improvements for twenty cities in New York State, excluding New York City and Syracuse.

TABLE 12

Subdivision Improvement Requirements for
364 Cities 10,000 to 25,000 in 1958
Having Subdivision Regulations

<u>Type of Improvement</u>	<u>Cities Requiring Installation at Developer's Expense</u>	
	<u>Number</u>	<u>Percent</u>
Street grading	216	59%
Street grading and surfacing	255	70
Curbs and gutters	231	63
Sidewalks	163	44
Water mains	277	76
Sanitary sewers	286	79
Storm sewers	219	60
Street trees	62	17

SOURCE: International City Managers' Association, The
Municipal Year Book, 1958.

TABLE 13

Subdivision Improvement Requirements for
20 Cities in New York State in 1958

<u>Type of Improvement</u>	<u>Cities Requiring Installation at Developer's Expense</u>	
	<u>Number</u>	<u>Percent</u>
Street grading	13	65%
Street grading and surfacing	9	45
Curbs and gutters	10	50
Sidewalks	10	50
Water mains	14	70
Sanitary sewers	16	80
Storm sewers	13	65
Street trees	4	20

SOURCE: International City Managers' Association, The
Municipal Year Book, 1958.

There are obvious conclusions that can be drawn from these surveys. First of all, it is clear that a high percentage of municipalities all across the country require developers to install subdivision improvements. About two-thirds to three-fourths of the communities surveyed require the subdivider to meet the cost of these improvements. Secondly, it is apparent that a higher percentage of larger cities require the developer to assume more costs than do the smaller cities. Thirdly, the surveys show that the developers who operate outside the city limits are required to pay a larger share for more improvements than are those within the corporate limits at least in Virginia and Tennessee. Finally, one has to conclude from these surveys that cities and towns all across the nation are increasingly calling on the developer, who creates the need for local improvements which are of special benefit to the subdivision, to bear the cost, rather than the municipality and the general taxpayer.²¹²

The cost of making the required improvement adds to the investment the developer must have in his subdivision.²¹³ Obviously it will cost a subdivider more to comply with qualitative requirements imposed by the local approving body than it would cost him if he were to proceed unregulated. Professor John Reps makes an excellent point on requiring developers to bear the improvement costs:

²¹²Lynbrook v. Cadoo, 252 N.Y. 308, 169 N.E. 394 (1929); Blevens v. Manchester, (New Hampshire) 170 A.2d 121 (1961); Zastrow v. Village of Brown Deer, 9 Wisc. 2d 100, 100 N.W. 2d 359 (1960).

²¹³Melli, supra note 206, at 435.

If the subdivision regulations do not require the developer to grade and pave streets and to construct or install even the minimum utilities necessary to convert raw land into building sites, he may begin selling lots after doing no more than staking out the streets, and lots, and setting up a few street name signs. Many people who buy lots in such subdivisions are ignorant of what is necessary to make land usable for home building. Later, when confronted with the need of street surfacing and water and sewer facilities, those who are unable to shoulder this unexpected burden either lose their investments or proceed to build in a manner almost certain to create unhealthful conditions.²¹⁴

Reps continues, pointing out the effect of inadequate regulations on adjacent lands on the city as a whole:

A development of this character is not only detrimental in itself, but it also usually destroys opportunity for the satisfactory development of nearby lands. The owners of adjacent tracts are unable to market a higher type of development and have no alternative but to follow the established bad example. Thus the blight spreads to increasingly large areas with resultant financial losses to other property owners. The city is the loser also in reduced tax income and increased expenditures for public services. Without public services, the health and safety of citizens are eventually threatened by the resulting bad conditions. The city must then step in to surface streets and lay water and sewer mains. Since residential developments of this character are rarely able to pay the full cost of improvements, a portion of their cost must be borne by the general public.²¹⁵

The question is really whether or not the general taxpayer in the community should be asked to subsidize part of the cost of the new resident's house and lot. At issue too is the policy question of whether or not the new resident should be protected against special assessments by the city for street and utility improvements that he thought were included in the cost of house or lot at the time of purchase. Equally important is protection of the city government and its finances against the possibility that assessments and taxes will not be sufficient, or difficult to collect, if the improvements are to be made at public expense.²¹⁶

²¹⁴International City Managers' Association, Local Planning Administration 346-47 (3d ed. 1959).

²¹⁵Ibid. at 347.

²¹⁶Ibid. at 357.

Another major reason to require developers to make the improvements is that

. . . it tends to discourage over-subdivision because the land owner, having such a large investment in the project, subdivides only when he knows he can sell the lots. This prevents the loss that often results to the city which has put the streets and sewers in areas which will lie idle and vacant. 217

One has to conclude that

In the long run it will be beneficial to the city and to the purchasers of building sites if all or most of the costs for land development are reflected in the sales prices of lots. If the policy of requiring all reasonably necessary improvements at the subdividers' expense is adhered to consistently, reputable subdividers will not be penalized. 218

Individual developers and their various associations have frequently exerted rather strong pressure on local officials either to refuse to adopt subdivision regulations with stringent requirements for improvements, or; if adopted, to reduce the requirements for street and utility improvement and installation. They take the position that these requirements inhibit development and stifle community growth and make provision of low-cost or moderately priced housing difficult or impossible. A town's response to this pressure is often surrender to the developers' demands. Sometimes a city, eager for "development," will lower their requirements, or drop them altogether. Melli states, for example, that one city ". . . dropped its requirement that the subdivider install utilities because it found that this deterred platting." 219

127 Melli, supra note 206, at 438-39.

218 Ibid.

219 Ibid.

These requirements should deter platting if the subdivider is unable to provide a complete product, with all the basic needs. Still, all too many people hold the view that to allow the locality to make ". . . such heavy demands on the landowner. . . is both undesirable and unfair to the landowner."²²⁰ This view is not justified. The landowner creates the demands. He is not forced to develop his land,²²¹ no governing body tells him he must do so. He develops his land because the city, supported by the taxpayers, is there. Were it not, there would be no demand for his tract for residential development. He, therefore, profits simply from the existence of a city.²²² He should not profit more by being allowed to develop land without adequate utilities, eventually forcing more costs onto the city.²²³

In any case, the developer wins financially, rather than losing money, because the more improvements a subdivision has the quicker the houses and lots sell,²²⁴ and at a higher price, too, all other factors being nearly equal. One cannot seriously doubt that if the policy of requiring all reasonably necessary improvements at the subdividers' expense is adhered to consistently, reputable subdividers will not be penalized. And the taxpayers will not be forced to subsidize speculation in land.

²²⁰Id. at 439.

²²¹Ridgely v. Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

²²²Bair, Bair Facts 45 (1960).

²²³As one illustration, at random, it was reported that adopting subdivision regulations requiring subdividers to grade and pave streets and install water and sewer lines has saved Cayce, South Carolina taxpayers \$24,118.12 in a period of not quite two years's time. Columbia Star, March 25, 1964 p. 12.

²²⁴Ford Realty Co. Constr. Co. v. Cleveland, 30 Ohio App. 1, 164 N.E. 62 (1928).

If one accepts the position that the developer should pay the costs of improvements the need for which they create, as herein discussed, the matter of distinguishing between needs and facilities specifically attributable to a particular subdivision and what may generally be considered community wide facilities must be confronted, particularly in terms of what requirements may be imposed on developers.

The improvements discussed in this chapter have been generally accepted throughout the land. Provisions relating to open space, park and school land dedication have not enjoyed such acceptance thus far. These are examined in the following chapter.

CHAPTER VI
LAW IN FLUX
OPEN SPACE, PARKS AND SCHOOLS

One pressing need as urban concentrations increase is that of safeguarding areas where our citizens can play and otherwise maintain contact with nature.¹ Planners, viewing the results of the recent building boom in metropolitan areas of the United States, often bemoan the lack of adequate open spaces. Indeed, the unsatisfactory environment which is created by development of every square inch of our urban areas has been the subject of widespread discussion and debate.² The nearly unanimous opinion of planners and public officials concerned with the problem is that the seemingly inexorable merger of cities and suburbs into a megalopolis characterized by a continuous urban sprawl is one of our most serious environmental problems.³

According to Urban Renewal Commissioner William L. Slayton, there is now plenty of open space land, even in metropolitan areas,

¹Lewis, "Recreation and Open Space in Illinois," Bureau of Community Planning Newsletter, March 1962, p. 1.

²Whyte, Securing Open Space for Urban America: Conservation Easements (Urban Land Institute Technical Bull. No. 36, 1959), Bickley, "The Provision of Open Space, Legal Basis and Procedure," 2 Institute of Planning and Zoning 41 (1961); Eveleth, "An Appraisal of Techniques to Preserve Open Space," 9 Vill. L. Rev. 559 (1964); Krasnowlecki & Paul, "The Preservation of Open Space in Metropolitan Areas," 110 U. Pa. L. Rev. 179 (1961); "Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or By Ordinance?," 50 Cal. L. Rev. 483 (1962).

³Volpert, "Creation and Maintenance of Open Spaces in Subdivisions: Another Approach," 12 UCLA L. Rev. 830 (1965).

for recreation, parks, and conservation purposes.⁴ It is true that America does not lack for open space in an absolute sense, because our urban millions occupy only about three per cent of our land area,⁵ but this abundance of open land cannot last indefinitely. Urbanization uses up about one million acres of open land each year.⁶

Open space land is land that is not built upon or otherwise urbanized. There is great competition for undeveloped land. It is sought not only for recreation uses, but for other public and private uses -- farms, airports, cemeteries, reservoirs, transportation routes, and industrial sites. Poor conservation policies waste additional open land, and more is consumed through urban expansion. All these uses compete for the limited land available.⁷

The need for open space

The provision of open space for public uses in densely populated urban areas is important. The need for it is well accepted. We need open space for parks, recreation areas, conservation areas, and areas for hunting and fishing. We also need land for highways and streets, and we need it for schools, hospitals, public buildings, and utility facilities and operations. The growing importance of preservation of open spaces is illustrated by the new federal aid program for acquisition.

⁴Address to Recreation Development Congress, Honolulu, Hawaii, February 15, 1964.

⁵Mandelker, "What Open Space Where? How?" Planning 15 (1963).

⁶Slayton, supra note 4.

⁷Lewis, supra note 1, at 1.

The reservation of open spaces can serve many beneficial purposes: it can break the monotony of urban sprawl; create a better environment and prevent congestion; conserve natural resources and scenic features of the land; help to prevent soil erosion and floods; aid in the creation of cohesive, identifiable communities; and provide areas for the recreational needs of our rapidly expanding population. A few of the many kinds of open spaces that serve these functions are public parks, forest preserves, public and private golf courses, agricultural lands, watershed and flood control areas, parkway strips, riding and hiking trails, and common areas in cooperatives or condominium developments.⁸

Urban-rural fringe communities and satellite cities and towns need to see that a portion of their land is set aside for open space uses as they develop. Anyone can see the value of providing adequate parks and recreational facilities in and near our cities and particularly in the residential subdivisions on the outer perimeter thereof. The problem, in general, is how to provide these open spaces.

The means to provide open space

The specific object of this chapter is to see how land for parks and schools may be provided in new subdivisions, and how such provision can be forced on unenlightened, unwilling subdividers. Concentration on the means for creating open spaces within subdivisions is by no means intended to minimize the importance of acquiring open

⁸Volpert, supra note 3, at 831.

spaces for numerous other purposes. The creation and maintenance of open spaces within subdivisions is an appropriate independent concern, however, because the accelerated tempo of subdivision of the remaining open areas in our metropolitan districts is fast removing available land where the need for open spaces is often the greatest.⁹

A variety of different solutions have been proposed for the pressing problem of finding the means to create and maintain open areas.¹⁰ The devices which local governments have traditionally employed in providing neighborhood parks¹¹ include the acceptance of gratuitous dedications;¹² direct purchase of property rights in land;¹³ and, a more complicated method, condemnation under the power of eminent domain.¹⁴

⁹Since the end of World War II, over 2 million single family dwellings have been built in California, 1.4 million of which have been in subdivisions. Wood & Heller, The Phantom Cities of California 14 (1963).

¹⁰Whyte, supra note 2; Bickley, supra note 2; Eveleth, supra note 2; Krasnowiecki & Paul, supra note 2; The Homes Association Handbook (Urban Land Institute Technical Bull. No. 50, 1964).

¹¹See generally 75 Harv. L. Rev. 1622-23 (1962); 12 Syracuse L. Rev. 244-5 (1960); Williams, Land Acquisitions for Outdoor Recreation, O.R.R.C. (Study Report No. 16, 1962). As Williams points out: "American state and local governments have the constitutional power --and, in most cases, the statutory authority--to provide recreation facilities, in the form of parks or otherwise, and to acquire land needed for these purposes," Id. at 2.

¹²"The power of American municipal governments to accept gifts of land for recreation purposes has been upheld in a considerable number of cases. The legal differences between acquisition by purchase, condemnation, and gift involve procedural matters, not questions of substantive power." Williams, supra note 11, at 2.

¹³These property rights may take the form of the fee simple absolute or any lesser interest. The city may also acquire these interests by lease, lease-back, license, restrictive covenant or conservation easement. The use of the last device has received considerable attention in the area of "open space." See Whyte, Open Space Action, O.R.R.C. 17 (Study Report No. 16, 1962); 12 Stan. L. Rev. 638 (1960).

¹⁴Rindce v. Los Angeles County 262 U.S. 700, 43 S. Ct. 689 (1888). See generally 11 McQuillan, Municipal Corporations § 32.53 (1950).

With the scarcity of philanthropic donations,¹⁵ park acquisition has depended primarily on the city's expenditure of public funds. The most obvious and easiest method of preserving open space is by the outright public acquisition of land for parks, recreation, the preservation of historical landmarks, and other similar purposes. The major problem in acquiring and maintaining such open spaces is, of course, the limited financial resources available. Because of the inadequacy of public funds, government acquisition cannot be relied upon as a practical means for setting aside sufficient quantities of open spaces for our urban needs. This is particularly true in those areas which are subject to the greatest subdivision because these also involve the greatest demand to expend public funds for other projects traditionally given higher priority, such as streets, schools, sewers, and, at most, small local parks for active recreational use.¹⁶

If public finances are inadequate, other methods must be found to reserve and maintain open spaces. Thoughts have rather naturally turned to use of the zoning power, a well-established device for controlling land use. It has thus far met with very little success--private property may not be zoned for park purposes, because it would amount to an unconstitutional "taking" of the property without payment of just compensation.¹⁷ Neither has large lot size zoning provided real "open space" for use of the public.

¹⁵See 37 So. Cal. L. Rev. 304, 326 (1964), where it is noted that infrequency of donations is often due in part to the state's failure to make such gifts advantageous to the donor by way of specific tax benefits.

¹⁶Volpert, *supra* note 3, at 831.

¹⁷The zoning power, may, however, be used as a preliminary step

In seeking devices by which to shift the costs of acquiring neighborhood parks and school sites, cities in some states have turned to the subdividers as the group responsible for creating the residential need for such facilities. It is their activities which in great part cause the massing together of large residential areas, thereby localizing the demands for urban services and for recreational facilities. This objective has been implemented by exacting -- or attempting to exact -- the dedication of land within the subdivision for park or school purposes, or the payment of fees in lieu thereof, as a condition precedent to obtaining approval of the subdivision plat.¹⁸

Extent of Dedication or Reservation Requirements

There is not a large volume of case law on the validity of requiring park and school land dedications. It is, therefore, difficult to assess from this source the extent to which local governments require such dedication or fees in lieu thereof. There are, fortunately, two surveys which have been made, and the findings are relevant to this discussion.

to purchase or eminent domain proceedings. As indicated by Whyte, Securing Open Space for Urban America 24 (Urban Land Institute Technical Bull. No. 36, 1959): "If a landowner finds the community has zoned his property against development because it may want to buy it for a park, he cannot build on it unless he can prove he is unable to earn a fair return on the value of his land." The maximum time limit on this device is generally held to be about one and one-half years; in Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), three years was held to be unconstitutionally excessive.

¹⁸The use of the fee insures that where appropriate land for a park within the subdivision is lacking, the subdivider will contribute a pro rata share toward the purchase of land which will service his development. It also insures that the city will not have a large number of very small parks scattered about the city, and difficult to maintain, because the small subdivision developer could provide a lump sum rather than a plot of land too small to be practical or useful.

The first survey results were published by Lautner in 1941; the second survey was reported in 1960.²⁰ Though twenty years apart, the findings are similar in many ways, and both show that such regulations are more widely used than one might think in view of the small volume of case law that exists.

Lautner indicated that of the 284 subdivision regulations he surveyed,

One hundred and three were found to contain some form of general regulation of public open spaces. In most cases the requirements are extremely vague, seemingly indicating a considerable uncertainty as to the extent to which requirements are enforceable.²¹

Harral's survey found that the use of vague phraseology is still a characteristic.

For example, many times the method of providing the required spaces is by dedication or reservation, with nothing whatsoever to guide the administering agency as to how much land, if any, the developers may be required to dedicate or reserve.²²

Harral also found that frequently ordinances required that sites be "suitably" located and of "appropriate" size.²³ The obvious lack of standards and the difficulty in administering such requirements foreshadows their fate if tested in court.

The earlier survey found that primary concern was given to recreational open spaces -- parks and playgrounds.²⁴ The later one, however, concluded that the majority of provisions no longer apply only to recreational areas. Of the 206 ordinances investigated here,

¹⁹Lautner, Subdivision Regulations (1941).

²⁰Harral, The Provision of School and Park Sites Through Subdivision Regulations, unpublished MCP Thesis, Georgia Tech, 1960.

²¹Lautner, supra note 19 at 178.

²²Harral, supra note 20, at 39.

²³Ibid.

²⁴Lautner, supra note 19, at 177.

123 of them contained regulations relating to park and school sites; sixty-nine per cent of them applied to parks, playgrounds, and schools; thirty per cent related to recreation spaces, but not schools; and one single ordinance had a provision relating to schools only.²⁵

All the provisions relating to open space that were studied in the Harral survey were divided into two very broad classes -- those which request consideration of such areas for these uses and those which require dedication, a cash contribution in lieu of dedication, or some kind of reservation. Thirty-nine per cent of the ordinances in Harral's survey were in the former category, sixty-one per cent in the latter.²⁶

The variations in these ordinances were very great, but most of them had provisions relating to the size and location of sites and the methods used to acquire by the cities. The most common methods for determining the size and location of park and school sites is that of relating the provisions in the subdivision regulations to the city's master plan.²⁷ This frequently used device has many advantages, one of them being the significance the courts attach to the master plan as a basis for various requirements. For another, the subdivider is put on notice that the city expects certain dedications from him, and this method is adequate for administration, too.

Requirements that a percentage of a subdivision be devoted to public use have been used in the past and are still being used extensively. Some provisions in both the surveys required a specific percentage; some "suggested" a figure. The net percentage was required

²⁵Harral, supra note 20, at 39

²⁶Id.

²⁷Id. at 40.

in some instances, the gross percentage in others; and the figure required a suggested range from three to twelve per cent.²⁸

There is a wide diversity of opinion as to just what percentage a subdivider can economically afford to dedicate. The Urban Land Institute has said the subdivider can afford not more than five per cent,²⁹ others have agreed on ten per cent,³⁰ and in one case eleven and four-tenths per cent was thought to be practical.³¹ The amazing fact is the realization of real estate men and their organizations that they can afford dedication of some land in their subdivisions.

The use of requirements based on percentages has been a very unsatisfactory method according to Harral.³² One of the greatest problems has been that percentage regulations ". . . have resulted in a multitude of little parcels of public land too small to effectively use and too expensive to maintain."³³ Further, such provision may not fit in with the city's master plan designation.

Another possible method is the use of population standards to determine site sizes. Such a method could be useful, because population predictions could be made for the park or school area on the basis of lot sizes or population densities permitted under the subdivision regulations. Population standards there could be applied to the predictions to determine the size of the site to be designated on the master plan. Then the subdivider who is required to dedicate

²⁸Lautner, supra note 19, at 183; Harral, supra note 2, at 10.

²⁹Community Builders Handbook 91 (1947).

³⁰Perry, "The Neighborhood Unit," Neighborhood and Community Planning VII 61 (1929).

³¹Harral, supra note 20, at 12.

³²Ibid.

³³Urban Land Institute, Subdivision Regulations, and Protective Covenants 2 (Tech. Bull. No. 8, 1947).

land and/or contribute money to the cost of providing public sites could be certain of providing only his fair share and no more.³⁴ Relating population density to park and school requirements is a significant notion which can be of great value in arriving at a sound policy for provision of urban needs.

When a local government requires the subdivider to bear the cost of providing park and school sites, its requirement can be for dedication of land or for a cash contribution in lieu thereof. Harral states in his survey that forty-seven per cent of the 123 ordinances with park and school site requirements contained dedication provisions.³⁵ Some of these, however, gave the planning board the choice of dedication or reservation. Still, it is a good omen to see that so many cities, relatively speaking, are now attempting to exact a condition precedent that would never have been attempted a few years ago.

Many feel that if the subdivider is to bear the cost of site provision, the cash contribution should either supplement or replace the dedication of land.

Since city plan designation cannot anticipate the pattern of subdivision activity, one subdivider might find that a large portion of one of these sites was within his subdivision, while an adjacent subdivision, perhaps a larger one might contain none of the proposed public land.³⁶

To require the first subdivider in the example quoted to dedicate a large parcel but requiring no dedication from the second would be

³⁴Harral, supra note 20, at 14.

³⁵Harral, supra note 20, at 28.

³⁶Id. at 31.

grossly unjust; it violates the basic concept of equal protection of the laws. This example serves to show some of the problems involved in a simple reliance on park and school site designation as the master plan. The only equitable way is for the city to acquire, without subdivider's participation, all major sites for public uses, such as park and school sites, requiring each developer to dedicate a percentage of his subdivision for playground and small park purposes. As an alternative, the city could require a dedication or cash contribution from all developers; it would be desirable to obtain cash in the majority of cases so that a fund for site acquisition could be established.

The cash contribution systems have varying bases for the fees. For example, Monterey, California requires \$25 for each lot in the subdivision; Modesto, California, requires \$100 for each acre (net); and Colorado Springs has a rather unique requirement basing the fee on a percentage of the net land area involved in the subdivision.³⁷

Reservation is used by a town that does not force the burden of site provision on the subdivider. This technique is valuable when the town does not have at the moment the funds necessary to purchase a piece of property, or when the need for such a site does not yet exist. This technique can be utilized to good advantage in connection with compulsory dedication in a well worded ordinance, because it is more than likely that the required dedications will not provide all the land needed for park and school sites, and other public purposes. Reservation is particularly valuable when the need for a particular sites does not yet exist,

³⁷Harral, supra note 20, at 32. Note that, except for California, only four other ordinances in his survey required cash contributions.

but the town wants to preserve the property in an open state; it is also valuable when the need exists but the local government does not possess the funds necessary to acquire the site.

One of the problems with the reservation technique has been the time period involved. Of the ordinances that Harral surveyed, twenty-six per cent with reservation provisions mentioned no specified time limit.³⁸ Lack of specific time provisions can lead to problems, because, carried to the extreme, a land owner could suffer damages through being unable to improve his land. In realization of this, some jurisdictions have exempted reserved sites from real estate taxes during the time reserved.³⁹ Harral found the use of specific time periods in 15 per cent of the site provisions he surveyed.⁴⁰ The reservation periods generally ranged from one year to three years; it seems that a one-year period is the most common one, but a longer time is usually advisable, particularly in large subdivisions.

It is interesting to note that in Harral's survey twice as many ordinances had indefinite time periods as had specific periods. It has been said that the indefinite period is preferable because it is more flexible; it can be contingent upon the owners not being "damaged" whereas a specific time period would be arbitrary.⁴¹ It is this writer's considered judgment that a specific time period is preferable because (1) it is less flexible, and, therefore, perhaps less likely to be considered arbitrary and (2) because determination of

³⁸There were several in this percentage that allowed, not required, reservation. One can only assume that the time limit would be settled by negotiation between subdivider and city. Harral, supra note 20, at 26.

³⁹Harral, supra note 20, at 26.

⁴⁰Id. at 27.

⁴¹Ibid.

"damage" to the land owner would be much too difficult to measure or ascertain.

In the matter of park and school site acquisition, as in so many others encompassed in subdivision activity, one finds that there is often informal agreement in the absence of regulations. These "informal" agreements may become so customary and so relied upon as a modus operandi that the machinery becomes formal in nature, though not provided for by ordinance. A "policy determination" in one California city, for example, informs subdividers of land outside the city that the city will buy for park purposes a suitable portion of land within any tract which is successfully annexed. Another city in the state agrees with the subdividers that at the time of annexation or subdivision of land, five per cent of the total area being subdivided at the sum of \$50 per acre will be set aside for park and recreational use.⁴²

Harral concluded that "Informal agreements cannot be recommended, as they put the subdivider into a bargaining position, where he ought not to be when the public welfare is at stake."⁴³ This writer submits, however, that in the absence of adequate statutory authority to require dedication for park and school sites, the town is better off if it bargains than if it attempts to do nothing; in fact, it is bound to bargain, granted that such action will not provide the results that would come from proper legislative authorization to the town, permitting required dedication.

⁴²Id. at 37.

⁴³Id.

Having investigated the results of surveys showing the extent of park and school site dedication requirement, the next concern is to determine how such provisions have fared in court.

Judicial Attitudes Toward Dedication or Fee Requirements

As indicated in the previous chapters, subdivision regulations generally provide that before a planning board approves a subdivision map for filing, it may exact certain specified conditions with which the subdivider must comply. While the nature of the conditions depends on particular state statutes, they almost uniformly provide that dedication of subdivision land for streets, gutters, drainage facilities, and sewers may be required.⁴⁴ However, statutes vary greatly with respect to whether conditions relating to parks and schools are permissible, as the foregoing discussion illustrated. Requirements for parks and schools represent the periphery of subdivision law at this time, an unsettled area that demands attention.

The justification for requiring the subdivider to bear the initial cost of these types of improvements is that he should not profit from his own sanctioned endeavors at the city's expense. Furthermore, because these improvements will primarily service the particular subdivision, the municipality should not use funds of all municipal taxpayers for this purpose. Implicit in this notion is the justifiable assumption that the subdivider will pass on the cost, via the price mechanism, to the prospective purchasers of homes in the subdivision,

⁴⁴See Yokley, Subdivisions 129-49 (1963), citing inter alia: Ayres v. City Council of Los Angeles 34 Cal. 2d 31, 207 P.2d 1 (1949) (streets); Petterson v. City of Naperville 9 Ill. 2d 233, 137 N.E. 2d 371 (1956) (curbs and gutters); Allen v. Stockwell 210 Mich. 488, 178 N.W. 27 (1920) (sewers).

and thus, those who will directly benefit from the improvements will ultimately pay for them.

Subdividers, understandably dissatisfied with this theoretical rationale for the required dedications, invariably claimed that the governmental action amounted to an eminent domain taking of private property for public use without payment of just compensation, in contravention of the state and federal constitutions. The unyielding reply to their discontent was announced in the early case of Ridgefield Land Co. v. Detroit,⁴⁵ in which a required dedication for street widening purposes was held valid. The court rejected the contention that this was an exercise of eminent domain, and stated that:

Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any reasonable condition which must be complied with before the subdivision is accepted for record.⁴⁶

Whether required dedications of subdivision land, or payment of fees in lieu thereof, for parks or playground purposes are reasonable conditions precedent is, of course, dependent upon the particular statute or ordinance under which the local board acts.

Dedication requirements specifically forbidden by statute

One pattern is represented by Massachusetts. That state is unique among the states in that its statute expressly forbids the requiring of dedication or fees for park purposes as a condition to plat approval.⁴⁷

⁴⁵241 Mich. 468, 217 N.W. 58 (1928).

⁴⁶Id. at 472, 217 N.W. at 59 (Emphasis supplied).

⁴⁷Mass. Ann. Laws, Ch. 41 § 81 Q (1961).

Dedication requirement specifically authorized by statute

Where the state act expressly authorizes the local governmental agency to order land dedication, or payment of fees, for park purposes, the municipality must show the reasonableness of the particular ordinance in terms of the amount of land or money required, and that the particular subdivision will receive the primary benefit from its use. For example, the New York statute states that the planning board shall require that the subdivision plat show a park or parks, of reasonable size, suitably located for playgrounds or other recreational purposes, and that this requirement may be waived in a case where such land is not needed."in the interest of the public health, welfare, and safety."⁴⁸ The case of In re Lake Secor Dev. Co.⁴⁹ has been widely accepted as establishing the principle of forced dedication in New York State. This case must be read with great care, however. Here the Supreme Court of the State upheld the validity of the State Statute, under which the Planning Board could compel the developer to make provision for a park or playground. The term "dedication" is not to be found in the law, which is worded as follows:

Before the approval by the planning board of a plat showing a new street or highway, such plat shall also show in proper cases and when required by the planning board, a park or parks suitably located for playground or other recreational purposes. (Emphasis added).⁵⁰

Edward M. Bassett, who was responsible for the words "showing" and "show," had this to say about the intent of the legislation:

⁴⁸N. Y. Sess. Laws 1927, ch. 175 s 149n. See N. Y. Town Law § 277; N. Y. Gen. City Law § 33; N. Y. Village Law § 179-1. Similarly, Arkansas and Washington and Montana permit the requiring of dedication of a reasonable amount of land for public facilities. Ark. Stat. Ann. § 19-2829(c) (Supp. 1963); Wash. Rev. Code § 58.16.110 (1951).

⁴⁹141 Misc. 913, N. Y. Supp. 809 (Sup. Ct. 1931).

⁵⁰N. Y. Town Law § 277.

It will be noticed that there is nothing in this requirement that compels dedication. It is regulation, not a taking. An open strip must be reserved (speaking of streets) of a certain width in a certain place, and the land owner can cede or dedicate or refrain from either if he wishes. . . . Now let us apply similar reasoning to play parks. Earlier statutes aiming to compel play parks were wrong in two particulars. First, they compelled dedication. . . . It has been shown that compulsory dedication is probably unconstitutional. . . .⁵¹

On this basis Professor Krasnowiecki has concluded that one cannot read Lake Secor as holding that under Town Law 277 a planning board has authority to compel dedication. In his view the most the case held was that the board may compel a developer to set aside some open space for use by new residents.⁵²

The court's holding is not generally understood as Krasnowiecki comprehends it, and with good reason. Regardless of what Mr. Bassett maintains, his wording works against his position. Streets are dedicated, even if the law says shown on the plat, and the same reasoning has obviously carried over to parks; if "show" means "dedicate" for streets it must mean "dedicate" for parks as well in New York. Further, the court used the word "dedicate" in its opinion, further undermining the Krasnowiecki view point.

A somewhat different situation is presented by a statute similar to those of New Jersey⁵³ or Puerto Rico,⁵⁴ in which there is express authority to require reservation of subdivision land for public purposes. It is not clear whether this implies denial of the power to require

⁵¹Bassett, Laws of Planning Unbuilt Areas 289 (1962).

⁵²Krasnowiecki, Legal Aspects of Planned Unit Development 49 (1965).

⁵³N. J. Stat. Ann. § 40:55-1.20 (Supp. 1961).

⁵⁴Laws of Puerto Rico 1942, No. 213, § 10, as amended by Laws of Puerto Rico 1947, No. 475, § 10.

dedication of the land. In Zayas v. Planning Board,⁵⁵ the Puerto Rican court construed its statute narrowly, to permit reservation only.

A more significant case than Zayas on reservation is Miller v. Beaver Falls.⁵⁶ In this notable case, a state statute authorizing cities to reserve park sites for a period of three years was invalidated. A Pennsylvania statute⁵⁷ gave city councils in third class cities authority to superimpose park sites on a master plan and to use such land as parks under a three year locus penitentiae. The City of Beaver Falls, acting under this statutory grant, adopted in 1950 a general plan for parks. Plaintiff Millers, who purchased the 4-1/2 acres in question after the park plan was adopted by Ordinance 960, contended that the ordinance constituted a taking of their property for public use without just compensation and was unconstitutional.

The statute provided that whenever a park might be shown on the park plan in sections not already built up, the city could thus reserve it, or, changing its mind, council could decide not to use it as a park.

⁵⁵69 P.R.R. 27 (1948). In Zayas it was held that the Puerto Rican statute requiring reservation of 5 per cent of a subdivision for schools, parks, and other public purposes was a valid exercise of the police power. The court emphasized that the reservation did not require an affirmative transfer of title to the government (dedication), and that if it had, it would raise "serious constitutional questions." It would seem, however, that this distinction is of importance only insofar as the interpretation of the particular statute is involved; and that the constitutionality of a dedication under an appropriate statute has been well established. It is also notable that provinces in Canada can require a developer to make 5 per cent of his net land area (after roads) available for public purposes.

⁵⁶368 Pa. 189, 82 A.2d 34 (1951).

⁵⁷Act of June 23, 1931, Sec. 3701, Pennsylvania Public Law 932.

... unless an ordinance actually appropriating the land within the lines of said park or parkway to public use is duly passed by council thereof, or said land is acquired by council within three years from the passage of said ordinance superimposing said plan upon said land, said ordinance shall be null and void.⁵⁸

The Millers' petition was dismissed by the appellate court, which, after hearing, found that

... parks and playgrounds are not only desirable but have become a modern necessity and that the establishment of a park and playground on the property here involved was desirable and necessary to the development, growth, and expansion of the city. . . .⁵⁹

The Supreme Court of Pennsylvania did not concur in this reasoning - or the decision - of the Court of Common Pleas.

The Supreme Court began its reasoning by making a rather sarcastic remark about planning, saying that "Planning the future development or the building of a city Utilitarian and Beautiful, for present and future generations, has become the fashion of the day." The court did acknowledge the desirability of parks:

There is no doubt that parks have a beneficial effect on public health and public welfare and their establishment and maintenance is certainly desirable. Moreover, the public interest should be favored over private interests, whenever reasonably possible, if and when they conflict.⁶⁰

Note that the Supreme Court found the establishment and maintenance of parks and playgrounds to be desirable, but not necessary, as the Court of Common Pleas stated. Nor was the Supreme Court anxious to uphold public interest in this case.

⁵⁸Id. at p. 1084.

⁵⁹⁵⁶⁸ Pa. 189, A.2d 34, at 35-36 (1951).

⁶⁰Id. at 36.

. . . it must not be forgotten that all acts of the legislature and of any governmental agency are subordinate to the Constitution. . . and no matter how desirable the act may appear or how worthy the objective it cannot be sustained if it is interdicted by the Constitution.⁶¹

Continuing in the same vein as in its comment on planning, the court made the following comment on the constitutional protection of property.

It is well known that the Constitution of the United States and the Constitution of Pennsylvania provide for the protection and maintenance of liberty, but it is not so well known or remembered that they likewise contain certain specific provisions for the protection of private property.⁶²

The court seemed piqued that such a thing as reservation could even be tried, judging from some of its comments in the decision.

The court expressed unhappiness with the principle of forced street dedication,⁶³ saying that it was "too firmly established in Pennsylvania to be changed,"⁶⁴ but there was no good reason to extend it to park reservation.

It follows that the aforesaid cases involving a platting of streets should not and do not provide authority for an extension of the principle. . . . A principle of questionable constitutionality should not be extended beyond its present application or limitation, especially if such extension would violate either the letter or the spirit of the Constitution.⁶⁵

The court, concluding that the city, if it desired the Millers' land, could "readily and lawfully obtain it"⁶⁶ by providing just compensation, found local Ordinance 960 and the State Statute⁶⁷ unconstitutional on the grounds that they authorized a taking of private property for public use without just compensation.

⁶¹ Ibid.

⁶² Ibid.

⁶³ See Chapter VI discussion of this case as it relates to this principle.

⁶⁴ 82 A.2d 34, at 37.

⁶⁵ Id. at 37-38.

⁶⁶ Id. at 38-39.

⁶⁷ Act of June 23, 1931, Sec. 3702, Pennsylvania Public Law 932.

The question might be raised whether the three year reservation period was excessively long in this court's view. It can be said in answer that the period of time involved was not crucial. In Chelton Trust Co. v. Blankenburg,⁶⁸ an earlier case, the court invalidated an ordinance appropriating certain land for park use when a time period of only one year and three months was involved. One can only conclude that the Pennsylvania Supreme Court has not been able to find any reservation period reasonable, much less one of three years duration.

This is the only known case in which a statute specifically permitting park land reservation has been invalidated. As such it is not particularly important. It is important because of the court attitude that it discloses. It is a conservative attitude, a jaundiced attitude, and attitude unfavorably disposed towards planning. Fortunately this case does not set the trend for decisions on park site dedication or reservation.

The State of Montana expressly provides for dedication for park purposes, and provides that at least one-ninth of the subdivision land, exclusive of streets, may be required for that purpose.⁶⁹

In a recent case, Billings Properties Inc. v. Yellowstone County,⁷⁰ the State Supreme Court upheld the statute and required dedication of land for parks and playgrounds as a condition precedent to plat approval. Plaintiff refused to dedicate for such purpose, was refused approval of plat, and sued to invalidate the statutory requirement. The Supreme Court

⁶⁸241 Pa. 394, 88 A. 644

⁶⁹Mont. Rev. Code § 11-602 (1957).

⁷⁰394 P. 2d 182 (1964).

ruied that the dedication requirement was a reasonable exercise of the police power.

The court also noted that plaintiff, while conceding the validity of dedication requirements for streets, insisted that parks and playgrounds were "inherently different." The court disagreed, concluding that if the subdivision creates the specific need for such parks and playgrounds, then it is not unreasonable to charge the subdivider with the burden of providing them. The court stated further that the statute itself amounted to a legislative determination that the subdivision created the need for parks and playgrounds.

The question of whether or not the subdivision created the need for a park or parks is one that has been already answered by our Legislature. It is apparent from the provisions (of the statute), . . . that the Legislature determined that subdivisions of a certain size, that is, twenty acres or more, needed a park or parks. This amounted to a legislative determination that a subdivision of this size created the need for such park or parks, and that such need was not merely concomitant to the natural growth of a municipality. If the Legislature had felt that such parks were needed merely because of the growth of the municipality, it would not have made the requirement that land be dedicated for parks in subdivisions of this size absolute, but would have made the requirement similar to the one for subdivisions under ten acres, that is, leaving it to the discretion of one of the boards mentioned in the statute. . . .⁷¹

The decision in this case, and particularly the court's reasoning, should be kept in mind as other cases in this area are investigated.

Statutes silent or ambiguous regarding dedication

Many state subdivision acts are ambiguous or silent as to the legitimacy of requiring park or school site dedication as conditions precedent. Thus the propriety of conditions becomes a matter of statutory

⁷¹394 P. 2d 182, 184 (1964).

interpretation, analogies, and an inquiry into the policy behind the law. As might be expected, the courts are rarely in accord, owing perhaps to the disparate local experiences. In many cases the issue has not been directly presented to the court, or, if presented, the decision has been based on other grounds. The present status of the law relating to park or school dedication is, therefore, a matter of much speculation, often based on dicta arising in conjunction with approval or disapproval of other conditions.

In Ridgemont Development Co. v. City of East Detroit,⁷² the Michigan Supreme Court flatly rejected an attempt by the city to condition map approval on the conveyance of land to the city to be used for a park, declaring the action beyond the scope of the state statute. The landmark case of Ridgfield Land Co. v. City of Detroit,⁷³ was distinguished on the ground that in the latter the requirement for dedication of land for widening of streets in the subdivision was expressly provided for in the act. In Ridgemont there was no specific statutory authorization for the city's requirement that one lot from each subdivision be dedicated for park purposes.

⁷²358 Mich. 387, 100 N.W. 2d 301 (1960). The court indicated that decisions from other states having statutes authorizing such conditions were inapposite. While it was probably not a controlling factor in the decision, the court seemed concerned that the deeds had to be in absolute form rather than a dedication of land for park purposes; that is, the city refused the subdivider's request that the land revert to him upon failure to use it for such purposes. While it is not advisable to restrict the city's use of this land ad infinitum, there should at least be some way to insure that the land which is taken is used for a park as long as the conditions which justified the conveyance continue. This problem does not arise where the land is expressly dedicated for park purposes.

⁷³241 Mich. 468, 217 N.W. 58 (1928).

The Oregon Supreme Court in Haugen v. Gleason⁷⁴ was concerned not so much with the language of the state statute -- which provided that county regulations might be passed to prevent ". . . overcrowding of land or for facilitating adequate provision [for]. . . recreation or other needs. . . ."75-- as with the fact that the required fee, \$37.50 per lot, in this case, could be used for purchasing parks throughout the county. The court stated that "The regulation cannot stand because it fails to limit the use of money so produced to the direct benefit of the regulated subdivision." Had the use of the fee been so limited it seems apparent that it would have been held valid.

In Coronado Development Co. v. City of McPherson⁷⁷ the Kansas Court cited Haugen in rejecting a similar condition under similar statutory phrasing.⁷⁸ The court here also emphasized that the fee in lieu of dedication could be used for public areas other than in, and benefitting only, the affected subdivision.

Rosen v. Village of Downers Grove⁷⁹ also held invalid requirement for cash contributions for parks and schools. Here the ordinance required subdividers to dedicate land for educational facilities. It also allowed, if dedication were considered insufficient, the planning board to require any additional means for providing reasonable facilities. Under the provision the municipality tried to require developers to pay a lump sum - per lot - for education purposes. The court held this

⁷⁴226 Ore. 99, 359 P.2d 108 (1961).

⁷⁵Ore. Rev. Stat. § 92.044(1) (1963).

⁷⁶226 Ore. at 105, 359 P.2d at 111 (1961).

⁷⁷189 Kan. 174, 368 P.2d 51 (1962).

⁷⁸Kan. Gen. Stat. 12-705 (1949).

⁷⁹19 Ill. 2d 448, 167 N.E. 2d 230 (1960).

invalid because it was not authorized by the statute. Further, "educational purposes" was broader than the language of the statute.

In the Pioneer Trust & Savings Bank v. Village of Mount Prospect,⁸⁰ decided the next year, the Illinois Supreme Court again faced a required dedication for recreational and educational facilities. The state enabling act provided that the city's official map may indicate "parks" and "schools" and that a subdivision plat must show "public grounds in conformity with the applicable requirements of the official plan."⁸¹ The Village, acting under this express authority, required a dedication of one acre for every sixty residential sites or units. In the instant case, the developer had to contribute 6.7 acres for use as an elementary school site, with secondary use as a playground.

The court held this action and the enabling act under which it was taken unconstitutional as applied, stating:

The developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public. . . . But because the requirement that a plat or subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee. The distinction between permissible and forbidden requirements is suggested in Ayres v. The City Council of Los Angeles, which indicates that the municipality may require a developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the community.⁸²

The court then went on to find that the near capacity condition of the community school was the result of the total development of the

⁸⁰22 Ill. 2d 375, 176 N.E. 2d 799 (1961).

⁸¹Ill. Rev. Stat. Ch. 24 §§ 11-12-5, 12 (1962).

⁸²22 Ill. 2d 375, 379-80, 176 N.E. 2d 799, 801.

community and concluded that the school problem which allegedly existed is one which the subdivider should not be obliged to pay the total cost of remedying.

The court continued:

. . . this record does not establish that the need for recreational and educational facilities in the event the subdivision plat is permitted to be filed, is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden.⁸³

This interpretation of the "uniquely attributable" standard is far more stringent than that announced in other cases,⁸⁴ and the implication that the court would approve a requirement that meets its standard seems somewhat illusory. It is more than a little difficult to imagine how recreational and educational needs could be any more uniquely and specifically attributable to the population concentration resulting from large scale subdivision of land. It appears that the court in this case was disturbed by the absence of some pat formula relating need and exaction in order to avoid discriminatory taking; thus the decision that needs must be proved "uniquely attributable" to the development.

In conjunction with the Pioneer Trust case, one must note the decision in Gulest Associates, Inc. v. Town of Newburgh.⁸⁵ The Supreme Court of New York annulled a lot fee expressly authorized by the enabling act because (1) the fee could be used in any section of the town and thus was not for the direct benefit of the subdivision residents, but for the

⁸³22 Ill. 2d 375, 176 N.E. 2d 799, 802.

⁸⁴The court states that this standard is derived from Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); however, in Ayres the California court was much more liberal in its interpretation, finding valid the requiring of street dedication and improvements based on the added traffic burden specifically and uniquely attributable to the subdivider's building of ten residences.

⁸⁵25 Misc. 2d. 1004, 209 N.Y.S. 2d 729 (1960).

town as a whole, and (2) the statute failed to establish standards or tests. It would seem that this problem could be met by setting out standards and by statutory limitation of the use of the funds to the subdivision.

In a recent New York case, Jenad v. Village of Scarsdale,⁸⁶ the required payment of fees in lieu of land dedication has again been struck down. The Scarsdale planning commission approved plaintiff's subdivision plan on condition that he deposit with the village \$250 for each lot shown on the plan. This deposit was required by a village ordinance, which had been adopted pursuant to state statute. The deposit was to be placed in a capital reserve fund and could be used only for park, playground, and recreation facilities. The deposit was in lieu of any dedication of land for these purposes.

The court held the deposit requirement unconstitutional, finding the regulations here indistinguishable from those struck down in Gulest v. Town of Newburgh.⁸⁷

The court also ruled that plaintiff was not precluded from seeking recovery by his failure to protest formally at the time of his payment. Noting an element of duress, and the absence of any indication that the village had changed its position in reliance on the payment, the court ruled that plaintiff should recover what he "mistakenly paid" and what the village "illegally collected." ⁸⁸

⁸⁶258 N.Y.S. 2d 777 (1965).

⁸⁷225 N.Y.S. 538 (N. Y. App. Div., 1962).

⁸⁸258 N.Y.S. 2d 777, 780 (1965).

On the point of recovery of fees, this case is in contrast to Board of Education v. E. A. Herzog Const. Co.,⁸⁹ in which the court held that where a subdivider had voluntarily agreed to contribute to school construction cost he could not renege and recover his money.

The Oklahoma Supreme Court went a little farther in its interpretation of a voluntary action than did the Illinois court in Herzog. In Fortson Investment Co. v. Oklahoma City⁹⁰ the court encountered a rule of the Oklahoma City Regional Planning Commission that required conveyance to the city, by a warranty deed, of a flat five per cent of the gross area of a subdivision (not including streets and alleys) to be used for "public purposes." This requirement, not based on specific statutory authority, was a condition precedent to plat approval. The court here found that the plaintiff company, which had complied with the ruling, only to test it later, had not been deprived of its property unconstitutionally. The court found that the company had made a voluntary dedication to the public⁹¹ when it conveyed the disputed land to the city by deed, reasoning that the company could have gone to court before conveyance, and won. As a voluntary dedication it was not invalid, irrespective of the validity of the rule of the Regional Planning Commission. The validity of this rule was not considered by the court.

The fact that a developer would voluntarily contribute to school construction serves to indicate a realization of the (sales) benefits accruing to him as a result of having a new school in or near his subdivision. This point will be discussed subsequently.

⁸⁹172 N.E. 2d 645 (Ill. App. 1961).

⁹⁰179 Okla. 473, 66 P. 2d 96 (1937).

⁹¹66 P.2d 96, 99.

The California Experience

Analysis of the statute and the relevant cases adjudicated in California, a relatively advanced state in terms of subdivision regulation, will further point up some of the problems and should be most helpful for determining policy principles.

The subdivision of land in California is regulated under two separate segments of the California Business and Professions Code. The Real Estate Law,⁹² which is directed at controlling the sale of the subdivided lands, seeks to prevent fraud, misrepresentations and deceit in dealing with the public; and the Subdivision Map Act,⁹³ which requires approval of the governing body of a city or county of the subdivision map, or plat, before filing, and which is the California enabling legislation for subdivision control. It is within the context of the Subdivision Map Act that the problem of exacting conditions to plat approval arises; it provides in pertinent part:

Section 11525. Control of the design and improvement of subdivision is vested in the governing bodies of cities and of counties⁹⁴ but, in all matters concerning such design and improvement, any decision by a governing body is subject to

⁹²Cal. Bus. & Prof. Code §§ 10000-11021.

⁹³Cal. Bus. & Prof. Code §§ 11500-628. S. Rep. No. 178, *supra* note 11, indicates that the state subdivision act had two major objectives: "First--to coordinate the subdivision plans and planning, including lot design, street patterns, etc. into the community pattern and plan, as laid out by the local planning authorities. Second--to insure that areas dedicated by the filing of the subdivision maps, including public streets and other public areas, would be properly improved initially by the subdivider so that they would not become an undue burden upon the general taxpayers of the community."

⁹⁴Cal. Bus. & Prof. Code § 11527 provides: The governing body of a county has jurisdiction only to approve the map of a subdivision, or such part thereof, as may lie within unincorporated areas, and the governing body of a city has jurisdiction only to approve a map of a subdivision, or such part thereof, as may lie within the incorporated area of the city.

review as to its reasonableness by the superior court in and for the county in which the land is situated. Every county and city shall adopt an ordinance regulating and controlling the design and improvement of subdivisions.

Section 11510. "Design" refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width.

Section 11511. "Improvement" refers to only such street work and utilities to be installed, or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways, and easements,⁹⁵ as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof.

The act also provides that when a local ordinance has been passed, the subdivider must comply with its provisions, and when no such local ordinance is in effect, the conditions must relate only to streets and drainage ways.⁹⁶ Penalties are provided for the sale or offer to sell

⁹⁵In 1953 this section was amended to refer to such street work, etc. on the land "to be used for public or private streets, highways, ways, and easements," instead of on the land "dedicated or to be dedicated for streets, highways, ways and easements." (Emphasis added). The purpose behind the amendment was presumably to prevent the subdivider from arguing that he could not be required to improve any streets, etc., which he had not dedicated.

⁹⁶Cal. Bus. & Prof. Code § 1151 provides: In case there is a local ordinance, the subdivider shall comply with its provisions before the map or maps of a subdivision may be approved. In case there is no local ordinance, the governing body may, as a condition precedent to the approval of the map or maps of a subdivision, require streets and drainage ways properly located and of adequate width, but may make no other requirements.

Cal. Bus. & Prof. Code § 11506 provides: "Local ordinance" refers to an ordinance regulating the design and improvement of subdivisions, enacted by the governing body of any city or county under the provisions of this chapter or any prior statute, regulating the design and improvement of subdivisions, in so far as the provisions of the ordinance are consistent with and not in conflict with the provisions of this chapter.

land in violation of the act.⁹⁷

There has not been any definitive statement by the California courts as to whether parks are one of the "improvements" subject to control by local ordinance under the Subdivision Map Act.⁹⁸ An analysis of this problem must begin with the landmark case of Ayres v. City Council.⁹⁹ There, a subdivider of 13 acres in the Westchester District was required to comply with the following four conditions, imposed by the planning commission and approved by the city council, before his map would be accepted: (1) that a 10-foot strip abutting Sepulveda Blvd., a boundary street, be dedicated for the widening of that highway; (2) that an additional 10-foot strip along the rear of the lots be restricted to the planting of trees and shrubbery for the purpose of preventing direct ingress and egress between the lots and Sepulveda Blvd.; (3) that the extension of Seventy-seventh Street, which cut

⁹⁷Cal. Bus. & Prof. Code §§ 11538 (sale or lease prohibited before recordation of map), 11540 (voidability of deeds or contracts violating this chapter), 11542 (additional remedies against violator), 11541 which indicates those acts forbidden and provides specific punishment:

Any offer to sell, contract to sell, sale, or deed of conveyance made contrary to the provisions of this chapter is a misdemeanor, and any person, firm or corporation, upon conviction thereof, shall be punishable by a fine of not less than twenty-five dollars (\$25) and not more than five hundred dollars (\$500), or imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment.

⁹⁸That the issue is far from clear is indicated by the fact that both proponents and opponents of this device have strongly recommended clarifying legislation. Compare S. Res., supra note 11, at 46 ("It was the consensus of the committee that the present subdivision map filing act be amended so as to clearly prohibit a local agency from requiring outright dedication or gifts of cash as a condition precedent to the approval of a subdivision map.") with Bevins, supra note 39, at 6 ("The Subdivision Map Act should clarify the right of cities to impose a business license fee in this area and more specifically authorize cities to adopt a fee or assessment for the purpose of financing park acquisition and development.").

⁹⁹Cal. 2d 31, 207 P.2d 1 (1949).

across the subdivision, be dedicated to a width of 80 instead of 60 feet; and (4) that a small triangular island created by the extension of Seventh-ninth Street be dedicated for street use for the purpose of eliminating it as a traffic hazard.¹⁰⁰

The California Supreme Court, in rejecting the subdivider's contention that a city is limited to the express provisions of the act, stated:

The status of an autonomous city. . . is recognized by express references to city ordinances in the Subdivision Map Act. Where as here no specific restrictions or limitations on the city's power is contained in the charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not

¹⁰⁰The subdivider claimed that these conditions bore "no reasonable relationship to the protection of the public health, safety or general welfare, and amount[ed] to a taking of private property for public use without compensation." 34 Cal. 2d at 35, 207 P.2d at 3. The court in rejecting this claim, used language similar to that of the Michigan court in Ridgefield, stating: "[T]he proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public." Id. at 42, 207 P.2d at 7.

¹⁰¹There is considerable confusion as to whether a "charter city" is limited by the Subdivision Map Act, and if so, to what extent. Cal. Const. Art. XI, § 6 provides that charter cities have complete control over "municipal affairs" and that local ordinances relating to such affairs are not subject to the general laws of the state. See Cramer v. City of San Diego 164 Cal. App. 2d 168, 330 P.2d 235 (1958); City of Pasadena v. Paine 126 Cal. App. 2d 93, 271 P.2d 577 (1954); 26 Ops. Cal. Att'y Gen. 7 (1955); 27 Ops. Cal. Att'y Gen. 123 (1956); 34 Cal. Jur. 2d Municipal Corp. §§ 159-67 (1957). The content of the words "municipal affairs" is a matter for interpretation in each case; and, what was considered local at one time, may later become a matter of state concern. Pacific Tel. & Tel. Co. v. City and County of San Francisco 51 Cal. 2d 766, 336 P.2d 514 (1959).

inconsistent with the map act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighboring planning and traffic conditions.¹⁰²

In Ayres, the court expressly indicates that the local ordinance of Los Angeles, a charter city, must be consistent with the Subdivision Map Act, thus, it seems clear that subdivisions regulation is not a "municipal affair," and that the Subdivision Map Act applies to charter and general law cities alike. See Kelber v. City of Upland 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (state has occupied field of subdivision regulation; 29 Ops. Cal. Att'y Gen. 49, 50 (1957)). However, problems arise when a local ordinance is characterized in terms of its objective; thus, in Mefford v. City of Tulare 102 Cal. App. 2d 919, 228 P.2d 847 (1951), the court rules that the charter city (in this case by initiative of the electorate) could require a subdivider to install sewer and water facilities on the land to be subdivided at the owner's or subdivider's expense, on the basis that sewage disposal is a "municipal affair." More recently, and to the same effect, Longridge Estates v. City of Los Angeles 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960), ruled that a sewer charge made as a condition precedent to plat approval was a valid exercise of the police power by a charter city. However, in both Mefford and Longridge, the courts stated that these exactions were not inconsistent with the Subdivision Map Act, which would seem to imply a recognition that insofar as subdivisions are concerned, this is a "municipal affair" which is subject to the state act. This same conclusion would necessarily apply to conditions relating to parks.

Furthermore, with the broad interpretation by the Ayres court, of the power of "autonomous" cities (which is presumably synonymous with "self-governing"), it would seem that noncharter cities may also enact local ordinances to supplement the Subdivision Map Act under Art. 11 § 11 of the California Constitution which provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In view of this, and in view of the fact that the Subdivision Map Act makes no distinction between charter and noncharter cities (Cal. Bus. & Prof. Code § 11525 states that "every. . . city shall adopt an ordinance. . ."), both should be held to the same standards and requirements in passing "local ordinances" related to matters covered by the act.

¹⁰²34 Cal. 2d at 37, 207 P.2d at 5. (Emphasis added). Note that the Subdivision Map Act, does not refer to "planning." Whether by this the court meant to enlarge the scope of local ordinances beyond "improvements and design" as defined in the act, is not clear; however, such a conclusion hardly seems justified by the mere use of this one word.

Furthermore, the court interpreted Section 11511, as it then read,¹⁰³ as follows:

The word "improvement" as used in the act refers only to such improvements as are to be installed by the subdivider on the land to be dedicated to those needs. Implicit therein is the recognition that reasonable conditions may be imposed for the dedication of land for necessary purposes which is not to be improved by the subdivider. The provisions of the act do not impose the restriction or limitations on the land which may be dedicated as invoked by the petitioner, but merely constitute a definition of the word "improvement" as used in the act.¹⁰⁴

While dedication of a neighborhood recreational park was not involved in this case, it may be argued that by its liberal interpretation the court implied it would approve of such a condition under a local ordinance so long as it is "reasonable" and so long as the subdivider is not required to improve it. One problem with such an interpretation is that Ayres is easily limited to its facts inasmuch as all of the conditions required there were directly related to streets, traffic and safety; and, especially since the condition which might arguably be somewhat analogous to parks, the 10-foot planting strip, involved not a dedication of the land but rather a restriction of its use.¹⁰⁵ This

¹⁰³See note 55 supra. While there is apparently no legislative history or committee report dealing with this amendment, the fact that it came four years after the Ayres decision may indicate that it was not a legislative attempt to change the interpretation in that case. Also, the section still states that: "Improvement" refers to only such street work . . . to be installed, or agreed to be installed by the subdivider. . . ." which is what the Ayres court focused upon.

¹⁰⁴34 Cal. 2d at 37-38, 207 P.2d at 5. (Emphasis added.) What the court finds "implicit" in its reading of the act is not really as clearcut as is represented; especially since it provides a loophole by way of which the city might exact conditions precedent which seemingly are not within the purview of the act. Any hope for the validation of a condition precedent, however, necessarily lies in the acceptance by a court of this liberalizing interpretation.

¹⁰⁵In most jurisdictions the "reservation" in this case would ordinarily be considered an easement. See p.¹⁰⁵ for the legal distinction.

leaves Ayres only slightly useful in predicting the validity of requiring dedication of parks.

The next significant case in California dealt more directly with the problem. In Kelber v. City of Upland,¹⁰⁶ under a local ordinance, the subdivider was required among other things to pay \$1,440 for the "Park and School Site Fund" and \$1,500 for the "Subdivision Drainage Fund" as a condition to plat approval. The court, in holding these provisions to be in conflict with the Subdivision Map Act, rendered judgment for the plaintiff subdivider against the City of Upland for \$2,940,¹⁰⁷ stating:

The provisions here in question are not local ordinances regulating the design and improvement of a subdivision, as those terms are defined in the act.¹⁰⁸ It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities, and that they are not reasonable requirements for the design and improvement of the subdivision itself. It seems obvious that this fund raising method is not related to the needs of this particular subdivision or to the matter of making proper connections between this subdivision and the adjoining area; that it is not reasonably required by the type and use of the subdivision as related to the character of local and neighborhood planning and traffic conditions; and that it is inconsistent with and conflicts with the

¹⁰⁶155 Cal. App. 2d 631, 318 P.2d 561 (1957).

¹⁰⁷"After the Kelber decision, the Upland City Council felt that it would be inequitable not to make a refund to all subdividers of record. Because the City had been faced with this litigation for some time, fortunately no money had been spent from the park site fund." Alder, City Manager of Upland, Statement on April 24, 1964.

¹⁰⁸The court, in paraphrasing Cal. Bus. & Prof. Code § 11511, states that the word "improvement" refers only to such street work and utilities, to be installed on the land to be used for public or private streets. . . ." 153 Cal. App. 2d at 637, 318 P.2d at 565. This entirely omits from that part of the section the phrase "or agreed to be installed by the subdivider" which the court in Ayres laid great emphasis upon in finding it implicit "that reasonable conditions may be imposed for the dedication of land which is not to be improved by the subdivider." 34 Cal. 2d at 38, 207 P.2d at 5. While a "dedication" was not involved in Kelber, the court's narrow reading of § 11511 ignores the basis of the Ayres rationale.

provisions of the Subdivision Map Act which sets forth the conditions and requirements necessary for obtaining an approval of the map.¹⁰⁹

Many cities had, as a matter of course, been exacting such fees or requiring dedication of subdividers who, needing the planning board's approval, had submitted to these demands. Faced with the Kelber decision, many cities abandoned this device and substituted a business license fee or tax on a per lot basis -- the money thus collected being put into a general park and recreation fund.¹¹⁰

The Kelber case was not, however, the final word on the subject of dedication or "In lieu of" fees for parks. It seems the court there

¹⁰⁹155 Cal. App. 2d at 638, 318 P.2d at 565. (Emphasis added.) The court does not directly attack the use of the fee device in place of a dedication, which seems to imply that it is a valid form of exaction under the act. See Wine v. City Council of Los Angeles 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960).

¹¹⁰Cf. City of Los Angeles v. Rancho Homes, Inc. 40 Cal. 2d 764, 256 P.2d 305 (1953). In Newport Bldg. Corp. v. City of Santa Ana 210 Cal. App. 2d 771, 36 Cal. Rptr. 797 (1962), decided by the same Fourth District Court of Appeals that decided Kelber and Boyar, a business license fee in the form of a condition precedent to plat approval was struck down as regulatory in nature and inconsistent with the Subdivision Map Act since it did not relate to "design and improvement." The court noted that had the license been worded to "cover the plaintiff's whole operation of subdividing, improvement, construction and selling, as was done in the ordinance in Rancho Homes case" Id. at 777, 26 Cal. Rptr. at 802, it would have been a valid business license tax.

In response to the Newport ruling, Bevins, supra note 39, at 5, indicates: "Since that case, we in the City of Buena Park, have amended our ordinance to require a business license fee of \$25.00 on the business of subdividing land, which license is for the entire business operation of subdividing, improving, and selling land and the construction thereon and have specifically provided in the ordinance that the payment of the fee is not required as a condition on the filing of any subdivision map. Buena Park City Code § 16-68 (1960). I am aware of other cities which have adopted a similar business license ordinance. However, whether or not the Fourth District Court of Appeal would support its own suggestion or whether it would still feel that such an ordinance involved an area occupied completely by the State in the Subdivision Map Act is purely conjectural at this point and the status of the cities' right remains unclear."

was not concerned with the fact that the money collected was to be used for parks to be located throughout the city of Upland rather than limited to the particular subdivision. This allocation of costs in effect required the subdivision residents to bear the financial burden of benefits to the community at large, a result contrary to the rationale behind conditions precedent to map approval. The question which then remains unanswered is whether the decision would have been different had the exactions been made upon the express stipulation that the improvements would be located on, or close enough primarily to benefit, the subdivision being approved.

A partial answer was provided by the subsequent case of City of Buena Park v. Boyar¹¹¹ decided three years later by the same Fourth District intermediate appellate court (with, however, only one of the Kelber judges sitting). It was there held that a condition precedent of \$50,000 could be exacted to cover the cost of constructing an open drainage ditch or a concrete pipe to service the subdivider's land, the court emphasizing the fact that a drainage facility is one of the "improvements" which the city could specifically regulate under Section 11511. In discussing the Kelber decision, the court indicated:

The Kelber case does not hold that a requirement of payment for drainage is illegal. On the contrary, it expressly states that it is legal under the Subdivision Map Act but that the requirement under the facts of that case was unreasonable. There the fees exacted could be spent anywhere in the city of Upland. In the instant case the drainage ditch. . . was undoubtedly for the

¹¹¹186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

direct benefit of the subdivision in question when considered in relation to it and the adjoining area.¹¹²

The Boyar court also pointed out that under a 1959 amendment to the Subdivision Map Act, Section 11543.5,¹¹³ express authority had been given to the cities to enact a local ordinance requiring, as a condition to plat approval, a cash payment to cover the pro rata cost of drainage facilities required by the subdivider's development.¹¹⁴

While the above quoted language from Boyar seems broad enough to encompass a recreational park within its rationale, the fact that "drainage facilities" are expressly mentioned in Section 11511, and the very existence of the Section 11543.5 amendment, effectively precludes its use as direct authority for the validity of park fees or dedications. In fact, it might well be argued that by providing this detailed amendment for drainage, the legislature has intimated that any other condition not expressly mentioned in the Subdivision Map Act must await similar special legislation.¹¹⁵

¹¹²Id. at 67-68, 8 Cal. Rptr. at 679 (Emphasis added.)

¹¹³Cal. Bus. & Prof. Code s 11543.5. "Largely in answer to the predicament in which local entities in rapidly growing areas were placed by the Kelber case, the Legislature in 1959 enacted [this] statute." Howell, *supra* note 39, at 4.

Section 11543.5 expressly provides that a local ordinance may be enacted to require payment of a fee as a condition precedent, to cover the pro rata costs of drainage facilities, on the following conditions: that the ordinance must refer to a master plan; that it must be specifically found that the subdivision of the property will require the proposed facilities; that the fee demanded be fairly apportioned and the money collected be kept in separate funds for each local drainage district, and, that the ordinance involved must have been in effect 30 days prior to the filing of the map upon which payment is demanded.

¹¹⁴"With the above statutory authorization, the city could have required the subdivider himself to construct necessary improvements under the Subdivision Map Act, as a condition of approval. Instead, payment of a sum of money, \$50,000, was substituted. . . ." 186 Cal. App. 2d at 8 Cal. Rptr. at 679.

¹¹⁵Passage of the amendment to Cal. Bus. & Prof. Code § 11543.5

On the other hand, the validity of a local ordinance not expressly provided for by 11511 was upheld in the case of Longridge Estates v. Los Angeles,¹¹⁶ which was cited and approved by the Boyar court. In Longridge, a Los Angeles ordinance requiring a payment of \$400 per lot prior to the filing of a final subdivision map to defray the cost of existing city-wide sewer facilities was held to be a valid exercise of the city's police power.¹¹⁷ The court, relying on Ayres' broad interpretation, stated: "The Subdivision Map Act does not preclude, but does clearly approve local ordinances relating to matters covered by that Act."¹¹⁸ It would seem from this language that what the Longridge court has effectively declared is that a condition based on a local ordinance relating to "sewers" is similar enough, in terms.

also raised the question of whether by enacting such a provision the state has effectively preempted that area and any local ordinance requiring a fee for any other purpose would be "in conflict with general laws" under Cal. Const. Art XI, § 11. This doctrine of preemption has had vigorous and well justified application in the area of criminal law. Cf. In re Lane 58 Cal. 2d 99, 372, P.2d 897, 22 Cal. Rptr. 857 (1962); Abott v. City of Los Angeles 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960). However, it does not seem appropriate to extend this rationale to apply to the Subdivision Map Act, because it would greatly hamper local authorities in making the types of decisions which the act authorizes them to make, and would reduce the flexibility of the statutory scheme. The issue of whether fees may be required for park purposes should be settled under § 11525 and § 11511, based on the nature and purpose of the requirement, and not the device used to obtain it.

¹¹⁶183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

¹¹⁷The court dismissed Kelber as "inadequate" to invalidate the ordinance, although it failed to meet the test of "benefit to the subdivision" laid down in that case. An appeal to the Supreme Court was not taken. Associated Home Builders v. Livermore 56 Cal. 2d 847, 366 P.2d 448, 17 Cal. Rptr. 5 (1961), in which the California Supreme Court held valid the conditioning of a building permit upon a similar charge, on the ground that Cal. Health & Safety Code § 5471 expressly allows sewer fees to be imposed by ordinance; thus, the court did not reach the issue of its validity as an exercise of the city's police power.

¹¹⁸183 Cal. App. 2d at 539, 6 Cal. Rptr. at 905. The Longridge court stated that the demand "did not relate to the contents of the

of statutory purpose, to one relating to "drainage facilities" or "streets" (both of which are expressly mentioned in section 11511), to be consistent with the mandates of the act.

The question is whether it could be said that a condition relating to "parks" is likewise similar enough to be consistent.¹¹⁹ To present this single issue to a court would require a case in which a city, acting under a well-drafted local ordinance, exacted as a condition precedent to plat approval dedication for park purposes of a reasonable amount of land within the subdivision (or a fee in lieu thereof), to be used to acquire park space which would primarily benefit the subdivision, and which would be maintained by the city.

subdivision map in the sense of requiring that plaintiffs put something into the map or remove something from it, but related rather to fixing the time they were to do something required by Municipal Code section 64.11.2." *Id.* at 538, 6 Cal. Rptr. at 904. This analysis is unsatisfactory for two reasons: first, the fact that a fee was required rather than a dedication of land should be of no consequence, see note 10 *supra*, especially because the city could condemn part of the subdivider's land for its purposes and pay the required "just compensation" with the fee it had just collected from him; secondly, characterizing the demand as merely fixing the time of payment is unrealistic because the ordinance itself states that payment of the charge is "a condition of the tentative map of each tract," *Id.* at 534 n.l., 6 Cal. Rptr. at 901 n.l., and because failure to comply would result in disapproval of the plat, the charge is in fact a condition precedent within the Subdivision Map Act.

It may be assumed that the first quoted statement of the court was not crucial to its decision and that the same result would have been reached in light of the interpretation here offered.

¹¹⁹"The reasoning which applies to streets would logically apply to parks and other public sites so long as there is a reasonable relationship between the quantity and location of land to be dedicated without compensation, and the use of such land by the future inhabitants of the subdivision." Howell, City Attorney of Dairyland, California, address to Annual Conference of League of California Cities, 1961

Faced with such a case, it is conceivable that a court could rule that such a condition was a reasonable exercise of the city's police power and consistent with the Subdivision Map Act, although it would admittedly require a somewhat strained interpretation of both the act and judicial precedent; however, it seems far more likely that a court would simply refuse to make the jump in logic from "streets" to "parks" and would rule that the difference between them is fatal to exaction. The latter result has the virtue of leaving control over expanding the list of permissible conditions to plat approval with the state legislature, a body presumably in a better position than a court to weigh competing interests and make the necessary policy determinations. It has been said that if a court were to grant "parks" the same status as "streets" under the act, it might be allowing too much, for it would be difficult to exclude almost any conceivable improvement, from fire hydrants to street signs, from this rationale.¹²⁰ For the best solution specific authorization should be spelled out in the statute.

Recommended Legislation

State legislatures should enact statutory provisions allowing local ordinances to authorize city and county planning boards to condition map approval upon dedication of land, or payment of fees,

¹²⁰Urban Land Institute, Legal Aspects of Planned Unit Residential Development 45 (Tech. Bull. No. 52, 1965).

for park purposes.¹²¹ It is suggested that they enact legislation similar to California Business and Professions Code section 11543.5, which provided expressly that cities may enact local ordinance for conditions precedent relating to drainage facilities.¹²² To insure that it will survive the tests of constitutionality,¹²³ such legislation for park and school requirements should include the following essential features.

First, there should be provision for dedication of subdivision land to the city rather than a restriction on use. This feature would permit the city to improve and maintain the park and control its use.¹²⁴ As the Court in the Zayas case pointed out, there is a "practical problem

¹²¹The legal controls over subdividing of land present a convenient point at which to attempt to solve the problem of inadequate recreational facilities; however, this is clearly not the complete answer. The activities of builders who construct high-rise apartments in the city center are also localizing new demands for parks and recreational facilities and are subject to the same rationale of cost allocation. Consideration should be given to the possibility of conditioning building permits and zoning changes for such development on land dedication or reservation, or fees to be used to acquire parks or recreational facilities such as tennis courts and swimming pools.

¹²²This would incorporate the procedural safeguards provided for in 11543.5 Cal. Bus. & Prof. Code and would permit park acquisition in accordance with a master plan for parks pursuant to Cal. Gov't Code 65465.

¹²³See Heyman, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L. J. 119 (1964), where the author concludes that there is no violation of either the equal protection or the due process clauses of the Fourteenth Amendment to the Federal Constitution where there is equality of treatment between contemporaneous subdividers, and new subdivision home buyers are not required to pay more than their "fair" share for community facilities purchased by the exaction.

¹²⁴On the duty of the public agency to allow all the public within its territorial jurisdiction to enjoy the public parks, see Atlantic Beach Property Owners' Ass'n v. Town of Hempstead, 3 N.Y. 2d 434, 144 N.E. 2d 409, 165 N.Y.S. 2d 737 (1957). Compare Hicks Dev. Corp. v. Incorporated Village of Lawrence, 306 N.Y. 922, 119 N.E. 2d 604 (1954). However, it must be noted that, as a practical matter, a small park within a subdivision will have little drawing power outside of its immediate vicinity.

that the Government may not be authorized to spend public funds for the establishment of parks on land to which it has no title."¹²⁵ Furthermore, an attempt to require that the subdivider maintain the park might be considered unreasonably burdensome.¹²⁶

Secondly, provision should be made for payment of a fee in lieu of dedication of subdivision land. This would add great flexibility by authorizing the planning board to require a fee from the subdivider where it is not appropriate to obtain dedication because the subdivision itself is too small, the land is poorly located, or because it would be more advisable to have a single park serving several contiguous subdivisions.¹²⁷

Thirdly, there ought to be a provision for definite standards under which the government's power may be exercised. There are two aspects to this problem: (1) the amount of land or money required must be reasonable; and (2) the park must primarily benefit the subdivision being regulated.¹²⁸ Thus, the enactment should set definite limits: for dedication, probably 7-10 per cent of the total acreage

¹²⁵Zayas v. Planning Board, 69 P.R.R. 27, 36 (1948). On the possibility of raising funds for purchasing and maintaining a park by way of special assessment, see 14 McQuillan, Municipal Corporations 38,28 (3d ed. 1950).

¹²⁶As a practical matter a subdivider would prefer not to retain title to the land if it meant that he must pay property taxes on it, or if he might incur tort liability by reason of such ownership.

¹²⁷The case law - Haugen, Gulest, Coronado, and Jenad - would seem to dictate the necessity of a proviso that fees be spent in - or sufficiently near - the development from which collected in order to benefit those paying the fee. Use of the fee for city-wide or county-wide parks does not appear to be valid.

¹²⁸See note 83 supra.

to be subdivided would be appropriate;¹²⁹ and, for fees, it should likewise be limited to 7-10 per cent of the market valuation of the subdivision land at the time of filing. This would provide for some uniformity among the local ordinances and would set guide lines for determining which device should be used in a particular case. It would also insure that the amount to be expended on the purchase of park lands from fees collected, would be reasonably related to the size of the subdivision and thus, if properly located, would meet the "benefit to the subdivision" requirement.

Fourthly, a provision that the condition precedent may be waived in certain cases will be needed. This suggestion contemplates several situations: where it is virtually impossible to locate a park in or near the subdivision, for example, in mountainous terrain; where a park is unnecessary, for example, where the subdivision is built adjacent to an existing facility for recreation; and, where the subdivider has himself provided a satisfactory substitute for a park, for example, a subdivision swimming pool or tennis courts. This device is necessary to prevent inequitable application of the local ordinance.

Finally, there should be a provision to protect the subdividers' interests. This clause would include a requirement that the city commence improvement of the park within a reasonable time, for example three months after the subdivision is to be completed. Also, a provision that the land will be maintained as a park so long as the subdivision remains in use would afford a subdivider some protection.

¹²⁹ "Localities across the land are experimenting with this tool. In some areas the yardstick, uniformly imposed by ordinance, is 5 per cent of the tract for recreational purposes. The fraction may vary from 3 per cent to 12 per cent, and usually bears a reasonable relationship

If the suggested legislation were adopted, and local ordinances passed pursuant thereto, there would still remain the question of the validity of its application to a particular subdivision. Thus, a planning board would have to exercise its discretion consistently and reasonably. While difficult cases may arise,¹³⁰ and the determination of standards may be dependent on case-by-case litigation, the advantages of the local ordinance device for implementing a state statute, in terms of flexibility and fairness, far outweigh any disadvantages.

Summary

The subdivider and his development should contribute to the acquisition of park and school sites to serve that subdivision. They should dedicate land or contribute cash because a new subdivision creates a need for parks and school facilities.¹³¹

The decisions in the cases discussed may be considered generally unfavorable toward park and school requirements. However, it must be kept in mind that at this time there are still relatively few case decisions upon which to rely, and in most of these the fatal error that

to the density pattern. In some localities population density is used directly as a basis for allocating land for recreation." Siegal The Law of Open Space 17 (1960).

¹³⁰For example: a small subdivision may be built adjacent to an existing one which had been required to dedicate park land which now proves sufficient to support the new addition. It seems reasonable that the later subdivision should bear its pro rata share of the costs; however, the original subdivider has presumably recovered his loss from the homeowners, and a distribution to them would be difficult to apportion. A possible solution to this is to require an "in lieu of" fee from the new subdivider and use it to improve the park further by adding new facilities to it, for example, tennis courts or a swimming pool.

¹³¹Billings Properties, Inc. v. Yellowstone County 394 P.2d 182 (1964).

doomed the requirement could have been averted. The lack of experience in handling these matters is illustrated by the various methods utilized. A careful reading of these cases shows that there are three vital factors that must be present if park and school site requirements are to be upheld: there must be adequate, specific statutory authorization;¹³² the local ordinance must be reasonable in terms of land or money required;¹³³ and the particular subdivision from which the land or cash comes must benefit from its use.¹³⁴

The suggested legislation to allow dedication or cash contribution requirements recognizes the crucial nature of these items and includes provisions to cover them adequately. Passage of this kind of statutory authorization with adequate ordinances pursuant thereto will surely result in acceptance by the courts of park and school site requirements as valid conditions precedent to plat approval.

¹³²Ridgemont Development Co. v. City of East Detroit 358 Mich. 387, 100 N.W. 2d 301 (1960); Rosen v. Village of Downers Grove 19 Ill. 2d 448, 167 N.E. 2d 230 (1960).

¹³³Kelber v. Upland 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

¹³⁴Haugen v. Gleason 226 Ore. 99, 359 P.2d 108 (1961); Coronado Development Co. v. City of McPherson 189 Kan. 174, 368 P.2d 51 (1962); Gulest Associates, Inc. v. Town of Newburgh 25 Misc. 2d 1004, 209 N.Y.S. 2d 729 (1960); Jenad v. Village of Scarsdale 258 N.Y.S. 2d 777 (1965).

CHAPTER VII

ADMINISTRATION AND ENFORCEMENT

Cornick asked why it was that at the very time when

. . . the local governments themselves are foreclosing their tax liens on thousands of prematurely subdivided lots, the local planning boards, with the bitter experiences of the past fresh in their minds, should be approving new subdivisions?¹

A partial answer to this most pertinent question may be found in the nature and extent of the administration and enforcement of subdivision law across the land.²

Necessary Legislation

The basic law for subdivision control is state law. A municipality must have specific statutory authority in order to regulate the subdivision of land within its corporate limits or within its extra-territorial jurisdiction. Cities and counties are creatures of the state and have only the powers conferred by the legislature; they cannot act without enabling legislation. The oft-quoted "Dillon's Rule" accurately expresses the attitude of the courts regarding municipal powers:

¹Cornick, Premature Subdivisions 224 (1938).

²Another partial answer is that local planning boards have authority to disallow subdivision plats only under certain limited conditions, and not because of some really crucial considerations that should be included. See Chapter VII on timing and location controls.

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation -- not simply convenient, but indispensable.³

Judge Dillon went on to state that these principles were of "transcendent importance" and the basis of the law of municipal corporations.⁴

Nearly all states have some kind of subdivision control laws. Most of our states have general legislation on this matter. Some states lack general legislation to permit municipal regulation of subdivision activity, and the municipalities in these states which have desired to exercise any appreciable control over subdivisions have been forced to seek special or local legislation to enable them to do so.

The subdivision control legislation, whether general or special, usually provides for local control over subdivisions. It is at the local level that such activity is, and should be, regulated, through local government agencies, though the enabling law may thrust one or more state agencies into the administration of subdivision regulation. Certification on the plat of the approval of the subdivision by the state planning commission, the state board of health, or the state highway department is often required.

Reps points out that only in recent years have planning commissions exercised subdivision review powers.

³Dillon, Municipal Corporations I, Sec. 237 (5th ed. 1911).
Quoted in Kneier & Fox, Readings in Municipal Government and Administration 40-41 (1956).

⁴Ibid.

Even after the first city planning commissions were established the limited powers of review were still exercised usually by street commissioners or city engineers -- some authority other than the planning agency.⁵

After World War I there was a change, and subdivision control legislation began to place authority to review subdivision plats in the hands of local planning commissions. This change occurred as "... there was increasing emphasis on the concept of subdivision review as a device to insure sound standards of land development. . . ."⁶

Many of the general state statutes are patterned after the Standard City Planning Enabling Act suggested as a model by the Department of Commerce in 1928. A summary of the provisions of that model act follow:

The planning commission is designated as the subdivision control agency, with jurisdiction over the city and all land within five miles of the corporate boundary. After the commission has adopted a major street plan, no subdivision plat may be filed or recorded until it has been approved by the commission. Before exercising this authority the planning commission must adopt regulations establishing acceptable standards of subdivision design. These regulations may also specify the utility and street improvements which must be installed by the subdivider before approval will be granted. A performance bond may be accepted in lieu of completion of all these improvements before approval. Approval of the plat does not constitute acceptance by the public of any street or open space.⁷

Most of these statutes are very similar in nature, but though they are "essentially the same"⁸ they differ in several ways, particularly in provisions regarding conditions that must be met by developers in order

⁵Reps, "Control of Land Subdivision by Municipal Planning Boards" 40 Cornell L. Q. 258 (1954-55).

⁶Ibid.

⁷Id. at 259.

⁸Id. at 260.

to obtain plat approval. Other common differences relate to whether a comprehensive plan is required in order to exercise subdivision review, whether extraterritorial jurisdiction is permitted, and in the kind of enforcement controls provided.

State subdivision control legislation generally falls into one of two broad kinds; It can either be broadly permissive or it can establish definite restraints on the local government's authority in this field. More often state law establishes rather specific powers respecting municipal control of subdivision, thus restraining the power of local councils or commissions. In other states the law delegates to these bodies the authority to regulate broadly and extensively.⁹

The state legislation does have to be adopted by a municipality if it wants to exercise subdivision control powers. The kind of enabling legislation available is a crucial concern. Another crucial concern is administration of the regulations at the local level. It is here that subdivision control succeeds or fails, depending on the kind of administration and enforcement the regulations are given.

Local Administration

Quite a variety of agencies and officers are involved in subdivision regulation locally. The right to exercise control over the subdivision of land should be delegated to the local planning body. Under various statutes, however, this authority is vested in city legislative bodies and/or in various city or county officers designated by ordinance or

⁹See Chapters V and VI generally.

resolution, such as the city engineer or county health officer, for example. Such an arrangement only hampers the planning commission in developing and implementing its comprehensive plan for community development. Decisions on the proper methods of developing land should be delegated to the planning commission so that the city can take full advantage of its professional staff assistance in this field and so that the community can develop in an orderly fashion. After all, the basic method of subdivision regulation is ". . . by requiring the approval of the governing body, by resolution, of all plats after favorable referral by the planning board before such plats may be filed with the county recording officer."¹⁰ The right of a local planning commission to supervise subdivision development is well settled.¹¹

The review procedure

The local planning board authorized to supervise subdivision development by means of plat review is involved, along with the subdivider, in what is, or ought to be, basically a three phase procedure. These phases are the pre-application, preliminary plat, and final plat submission. In each of these phases the subdivider acts and then the planning commission reacts. In the pre-application procedure the subdivider studies site and market data, discusses financing, and develops a preliminary plan in sketch form which he submits to the planning commission. The planning commission reviews this sketch;

¹⁰Lake Intervale Homes v. Parsippany-Troy Hills, 136 A.2d 57 (1957).

¹¹Feldman v. Star Homes, 84 A.2d 903 (1951); State ex. rel. Prats v. City Planning and Zoning Commission of New Orleans, 59 So. 2d 832 (1952).

It relates the proposal to the comprehensive plan and to requirements in the subdivision regulations concerning improvements and design, and discusses its findings informally with the subdivider. In the preliminary plat stage the subdivider, if he elects to continue with his project, makes tentative arrangements with the lender and with F.H.A. and prepares and submits a preliminary plat for consideration by the planning commission. The commission reviews the application and the plat to determine whether they conform to subdivision standards. The commission will grant approval subject to conditions stipulated, or will disapprove the plat. In the third phase the subdivider develops the parcel according to the preliminary plat as conditionally approved, makes improvements or posts bond in lieu thereof, and submits his final plat, applying for planning commission approval. The planning commission reviews the application and, after field inspections, either grants approval or informs the subdivider what is lacking to obtain approval. Finally, when approval is given and certified on the final plat, the subdivider can record the plat and commence his sales program.¹²

Given a good procedure such as this, many things can still happen along the way to thwart proper supervision. First of all, it is necessary to have adopted adequate local ordinances to be able to exercise the review authority granted by statute. Sometimes this is neglected.¹³ Occasionally a city council will decide, for whatever reason, that it wishes to assume subdivision review powers itself. This

¹²HFA, Suggested Land Subdivision Regulations 14-15 (1960).

¹³Seat v. Louisville & Jefferson County Land Co., 293 S.W. 986 (1927).

will not be permitted where the legislation spells out the responsibilities of the planning commission.¹⁴ Nor may the local legislative body substitute its judgment for that of the planning commission after the planning commission as acted in conformity with the guiding statute.¹⁵ Occasionally a council will fail to create a planning commission to review plats, even when authorized by state law to do so. In such a case, its failure cannot be used as an excuse by the local legislative body for refusal to approve a plat meeting all the statutory requirements.¹⁶ The local legislative body may create a planning commission, but fail to enact a subdivision ordinance. Under these circumstances the subdivider can be held only to conformance with the appropriate statutory requirements.¹⁷

Supervision over subdivision activity is made possible by the authority to withhold the recording of subdivision plats if all the requisite conditions are not met. The power is a significant one, and courts have generally held that, while public policy requires municipal control of subdivision development, the power of a town to deny a landowner the right to develop his property by refusing to approve his plat had better be based on a statute and local ordinance with specific standards spelled out.¹⁸ Often the statute will specify administrative procedures

¹⁴Sparks v. Bolton, 335 S.W. 2d 780 (1960).

¹⁵Hollis v. Parkland Corporation, 120 Tex. 531, 40 S.W. 2d 53 (1931).

¹⁶People ex rel. Jackson & Morris, Inc. v. Smuczynski, 345 Ill. App. 63, 120 N.E. 2d 168 (1951); People ex rel. Tilden v. Massieon, 279 Ill. 312, 116 N.E. 639 (1917); Commissioners' Court v. Frank Jester, 199 S.W. 2d 1004 (Tex. 1947).

¹⁷People ex rel. Jackson & Morris, Inc. v. Smuczynski, 345 Ill. App. 63, 102 N.E. 2d 168 (1951); People ex rel. Tilden v. Massieon, 279 Ill. 312, 116 N.E. 639 (1917); North Rollingwood Property Owners Assoc. v. City Plan Comm. of New Britain, 209 A.2d 177 (1965).

¹⁸Knutson v. State, 157 N.W. 2d 469 (1959); Langbein v. Planning

for boards in their exercise of jurisdiction over subdivisions. Where this is so the board must follow that procedure; they may not substitute their own.¹⁹ Neither may a board substitute its definition of "subdivision" for that established in the statute. In a recent Connecticut case the court held that the local regulations were irrelevant, because the statute itself defined "subdivision," and it contained no provision authorizing a planning commission to adopt any sort of modified definition.²⁰

Imposition of conditions

It is well established doctrine that certain conditions precedent to plat approval may be imposed by a local planning commission, under proper legislation.²¹ The general rule is that the planning commission must adhere to statutory requirements; it cannot impose conditions that clearly exceed the statutory authorization.²²

The majority of the courts have held that where compliance with the statute and the ordinance is shown that planning commission approval

Board of Stamford, 146 A.2d 412 (1958); Beach v. Planning & Zoning Commission of Milford, 141 Conn. 79, 103 A.2d 814 (1954).

¹⁹State v. Cline, 125 N.E. 2d 222 (1954). Planning boards should establish their own written rules of procedure within the framework of state legislation and the local ordinance.

²⁰Peninsula Corp. v. Planning & Zoning Commission of Town of New Fairfield, 199 A.2d 1 (1964).

²¹See Chapters V and VI for discussion of conditions precedent.

²²Better Built Homes & Mortgage Co. v. Nolte, 249 S.W. 743 (1928); Shorb v. Barkley, 240 P.2d 337 (1952); Kling v. City Council of Newport Beach, 317 P.2d 708 (1957); State v. Cline, 125 N.E. 2d 222 (1952); Green-Town Memorial Park v. Neenah Bd. of Supervisors, 270 Wis. 378, 71 N.W. 2d 403 (1955).

of the plat is a ministerial function, and if approval is not given under such circumstances mandamus will lie to compel it.²³ The court in Wisconsin said that where compliance is shown, "The board's duty was to approve of it. Such approval under the circumstances was but the performance of ministerial act."²⁴ This does not mean that mandamus would lie to force approval of a tentative plat,²⁵ but only to a final plat.

Procedural safeguards

Administrative safeguards are provided by most subdivision control statutes. Statutes today generally provide that a public hearing must be held, with notice to interested parties,²⁶ before subdivision plans are approved, though there are a few exceptions to this rule.²⁷ One of the more significant procedural safeguards usually provided is the provision that planning boards have a specified time period in which to approve or disapprove a final subdivision plat. This period seems most often to be thirty to forty-five days after submission, a reasonable time which allows the commission to have at least one, perhaps two, meetings to study and discuss the plat. Sometimes the planning commission will not act within the specified time, even where compliance is shown, and the

²³Haermarm v. Wabash Ry. Co., 309 Ill. 524, 141 N.E. 289 (1923); Shorb v. Barkley, 240 P.2d 337 (1952); Commissioners' Court v. Frank Jester Development Co., 199 S.W. 2d 1044 (1947).

²⁴Greenlawn Memorial Park v. Neenah Bd. of Supervisors, 270 Wis. 378, 71 N.W. 2d 403 (1955).

²⁵Board of County Commissioners v. Exford Development Co., 121 A.2d 739 (1942).

²⁶Highpoint, Inc. v. Bloomfield Planning Board, 208 A.2d 149 (1964); Flick v. Gately, 328 Ill. App. 81, 65 N.W. 2d 137 (1946).

²⁷Feldman v. Star Homes, 84 A.2d 903 (1951).

courts have held that mandamus will lie to force approval of the plat in such cases.²⁸ The justice of this is easily seen; if commissions could arbitrarily delay their decisions a land owner could suffer considerable damage.

Added conditions

Courts have held, as well they should, that after plat approval no conditions can be added or no retroactive requirements imposed. In Levin v. Livingston Township,²⁹ for example, the township attempted to force Levin to comply with upgraded requirements passed after Levin obtained final plat approval for one section of his development. The court had no choice but to hold that, once final approval was given, the amended ordinance raising the standards could not be imposed.³⁰ This sort of thing has happened occasionally, and has always been rejected by the courts.³¹

"Disapproving" plats they have already approved is a trick of the planning boards that is closely akin to trying to make requirements retroactive. In the absence of specific statutory authorization permitting such "reconsideration," the planning commission is limited to a one-time-only decision on the final plat. The planning commission cannot "disapprove" a plat already approved.³²

²⁸Knutson v. State, 157 N.E. 2d 469 (1959); State v. Oestreich, 121 N.E. 2d 454 (1954); Pieper v. Planning Board of Southborough, 163 N.E. 2d 14 (1959); State v. Bard, 89 N.W. 2d 267 (1958).

²⁹62 N. J. Super. 395, 163 A.2d 221 (1961).

³⁰This indicates good reason for strict requirements initially.

³¹River Forest State Bank v. Village of Hillside, 129 N.E. 2d 171 (1955); Summit v. Horton Corp., 176 A.2d 34 (1961).

³²Ward v. New Rochelle, 168 N.E. 2d 821 (1960).

Waiver of requirements

The courts have held that, just as they cannot add conditions not encompassed by the legislation, planning boards cannot waive conditions or requirements.³³ The case of Borough of Oakland v. Roth³⁴ is in point. Here Mr. Roth bought a tract of land in the borough, opened an unpaved street and began selling lots. The planning board did have a master plan and subdivision regulations; so the borough brought suit to invalidate conveyances already made and to prevent them in the future without requisite subdivision approval. The statute here was good enough, except for one thing: It provided that the planning board could waive the requirement of its approval of a subdivision, and so could the local legislative body.³⁵ The court found that the legislation lacked reasonable and adequate standards to guide the municipality in waiving its delegated power,³⁶ and so ruled the particular statutory section in question unconstitutional.³⁷

It has also been found that requirements may not be waived merely because a planning commission has illegally waived them in other, earlier cases.³⁸

³³Midtown Properties, Inc. v. Madison Township, 172 A.2d 40 (1961); Treat v. Town Planning & Zoning Commission of Orange, 145 Conn. 406, 143 A.2d 448 (1958). A distinction is made here between waiving conditions and permitting variances from the ordinance where variances are allowed. Waiver of requirements is not desirable; granting a variance from the ordinance may be "... provided that such variation will not have the effect of nullifying the interest and purpose of. . . these regulations." HHFA, Suggested Land Subdivision Regulations 35 (1960).

³⁴28 N. J. Super. 321, 100 A.2d 698 (1953).

³⁵100 A.2d 698, 700

³⁶Ibid.

³⁷Id. at 702.

³⁸Treat v. Town Planning & Zoning Commission of Orange, 145 Conn. 406, 143 A.2d 448 (1958).

The comprehensive plan requirement

One of the major items which requires examination is the comprehensive plan as it relates to local subdivision administration. The basic problem here, and one that is frequently encountered, is a situation in which a city has a zoning ordinance and/or subdivision regulations, but has not officially adopted a comprehensive development plan to guide its growth. Such a plan is equally necessary to guide the application of the implementive ordinances.³⁹ This kind of situation may seem ridiculous or absurd, but it exists in many places. It exists because all too often the choice for understaffed planning agencies has been to spend a lot of time on the elements of a comprehensive plan, doing without a zoning ordinance or subdivision regulations in the meantime, or to come up with a control device such as zoning and subdivision regulations, ". . . to cope with the flood of development problems that will come, plan or no plan."⁴⁰ It seems to this writer, as it apparently has to several planning agencies, that it is better to have the controls without the plan than to have a grand plan without controls, if the choice comes to that. The seriousness of the problem is illustrated by the number of cases in which the courts have held that there must be a comprehensive plan in order for particular control ordinances to be valid.⁴¹ There is a problem here besides the very serious legal one, namely this: Under such circumstances, in a planless situation, how can a city control growth in a desirable way? It cannot,

³⁹See Chapter I for discussion of the relation of zoning and subdivision regulation to the comprehensive plan.

⁴⁰Delafons, Land Use Controls in the United States 84 (1962).

⁴¹Reps, supra note 5, at 262-264.

and the lack of a plan increases further the difficulty of the job of administering the subdivision ordinance.

Reluctant enforcement

One of the real problems in administration of subdivision regulations is the reluctance of officials to enforce the laws and ordinances they have available for use in dealing with the problems. Adequate state laws are a necessary first step for a successful subdivision control program. So are sufficient local ordinances. These provide the means for a willing group of administrators to enforce good subdivision practices. However, these laws are not worth the paper they are written on if the local county engineer, or building inspector, or planning commission, or city council is reluctant to use the laws to insure good subdivision practices by the developers. This reluctance to enforce laws and regulations may be a matter of politics, or of personal philosophy, or even of personal friendship.⁴² Whatever the reason may be, abuses to the common good have resulted from an unwillingness on the part of city councils, planning commissions, and responsible individuals to exercise their powers and responsibilities vigorously and diligently.

The ill results of the aforementioned poor subdivision practices⁴³ can be prevented only through adequate subdivision regulations intelligently administered and strictly enforced.⁴⁴ Compliance with the

⁴²As it was in the case of a city council in one Tennessee city which, contrary to its own ordinance, accepted the dedication of an unimproved street in a particular subdivision.

⁴³See Chapters III and IV.

⁴⁴Webster, Urban Planning and Municipal Public Policy 440 (1958).

requirements must be required if orderly development is to be achieved.

It may be in some cases that authorities are unwilling to enforce the regulations vigorously because they simply do not understand what subdivision regulation aims to achieve. It is certain that subdivision control, like zoning and other planning tools, can achieve maximum effectiveness only if and when the significance and potential of the device is completely understood by the authorities involved in its administration.

The planning commission, the building inspector, the zoning board of appeals, the county health officer, or the register of deeds can destroy the effectiveness of subdivision regulations, "... by overlooking violations or permitting exceptions to the regulations."⁴⁵ How can communities get local officials to administer and enforce the law properly? This is a tough problem, and one that varies from place to place. A partial solution is education of these people to the impact these subdivision regulations can have if properly enforced. Too, these commissions and these individuals are frequently subjected to pressure, perhaps temptation. It takes good men to resist, men of integrity, dedicated men. Adequate enabling legislation and adequate local ordinances in support of it are imperative for the successful operation of any kind of program of land subdivision control, but these are ineffectual "... without the assistance of a dedicated and public-spirited planning commission charged with the responsibility of administering the program."⁴⁶

⁴⁵Id. at 424.

⁴⁶Yokley, Subdivisions 35 (1963).

Politics and subdivision administration

Even with a dedicated planning board to administer subdivision regulations, the result is sometimes not what the community has hoped for. One of the reasons that results do not always match expectations is the fact that planning is so fundamentally a part of the political process, and therefore, subject to political decisions.

Many times the planners - the technicians - have drawn sound, practical, economical, and meaningful plans for urban areas only to see them

. . . dashed to bits on the shoals of avarice, misunderstanding, poor public relations, lack of leadership, social and public apathy, emotional bias, grivance, stupidity, social pressure, jealousy, bullheadedness, and scores of other individual and community factors.⁴⁷

One necessarily concludes that ". . . no function of local government embraces subject matter and problems more fraught with political values than planning."⁴⁸ This is particularly true with respect to the tools of plan implementation. Zoning and subdivision regulations are highly volatile - and highly political - areas. An added requirement in a zoning ordinance, a change in the building code, the refusal to grant a building permit, or an upgrading of standards in the subdivision regulations are things that arouse the developers and the property interests. Property owners can and do get very emotional when "government" interferes with the use they wish to make of their property. And when they get upset they try to influence local government officials. Developers

⁴⁷Ernest R. Bartley, address to Florida Planning and Zoning Association, Miami, Florida, November 30, 1962.

⁴⁸Engelbert, ed. The Nature and Control of Urban Dispersal 112 (1960).

are often able to exert considerable pressure, mustering support from property owners and people in general, probably because of the emotional appeal that they are bringing "progress" to the community. They are also in a position to bring pressure to bear because of their close relationships with the financial interests and institutions in the city. One fundamental influence here seems to be the traditional lack of respect for, and even distrust of, politicians, particularly at the local level, contrasted with our characteristic high regard for men of means in the community, represented by the bankers, realtors, and land developers.⁴⁹ Given this attitude it is not difficult to see how the developers and their allies can exert considerable influence.

This is not to say that these interests should not be able to seek their own ends, nor is it to say that planning should not be involved in politics. Planning is necessarily involved in politics, and politics is at the heart of the entire planning process. "Politics" should be understood to mean the process of formulating public policy. Given this understanding of "politics," it would be difficult to "... conceive of anything more fundamental in the policy-making field than urban planning -- setting goals for a community and implementing those goals."⁵⁰ Since planning is so inevitably a part of politics planners should accept the fact instead of bemoaning this involvement. They should realize what planning could accomplish in a favorable political "climate" for planning, and then work for the establishment of such a favorable environment. Those who work in the planning field have a major

⁴⁹Delafons, Land Use Controls in the United States 8 (1962).

⁵⁰Bartley, supra note 47.

responsibility for creating a "right political climate."⁵¹ If these people feel they are laboring in vain, rail at the "political situation," and throw up their hands in defeat, they dishonor their trust in a very crucial matter and thus make the establishment of a good climate for planning just the more remote.

The political climate is a reflection of many things that may be included in what we denote the economic and social climate. The economic attitudes prevalent in a particular locale have a very direct bearing on the political climate as it relates to planning, and an undesirable economic attitude will produce an undesirable political situation. Careful consideration of the economic factors influencing politics and planning could lead one to the conclusion that planning may not be very well suited to dynamic growth situations, where population growth, urbanization, and industrialization are occurring rapidly. Planning should be the instrument to guide development in areas where the growth is great and fast, but in an economic climate geared to land turnover with absolute minimum investment in land improvement⁵² and

. . . with the tremendous fortune to be made by poor land use, shifts in land use, placing the wrong facilities in the wrong places for the wrong reasons, allowing residential development for future slum purposes, and the like. . . .⁵³

planning and its means of implementation, zoning and subdivision regulation, confront an uphill battle to stem the tide of unwise development.

⁵¹ Ibid.

⁵² Metes and bounds sales are a great culprit in this regard. See pp. 218-229, infra.

⁵³ Bartley, supra note 47.

In far too many instances the instruments of government are used - or misused - for the benefit of the few, not the whole community:

Low grade subdivisions exist because it is highly profitable for a few persons to have them exist. Roads break down in poor subdivisions and have to be repaired at the expense of all the taxpayers because it was highly profitable for a few developers to put in poor roads, sell the lots, take their money, and get out, leaving the community holding the bag.⁵⁴

This kind of thing happens because of the political and economic climate sanctioning it, because the people of the community allow and encourage it, not recognizing their own long term interests.

Surely subdivision administration offers the possibility of pressures, even graft.

Since the values conferred or denied by land use controls are great, their administration affords exceptional opportunities for graft and by the same token exposes them to exceptionally strong pressures.⁵⁵

One doubts that graft has been eliminated in America, particularly in light of recent statements charging that zoning (and subdivision approval) is frequently "sold" in some areas of the country,⁵⁶ but this, as well as exposure to undue pressure, will decrease as the general public understands planning and zoning and subdivision regulation better, and moves to support their officials in enforcement of these controls.

In many, many areas of the country some of the fundamental and cherished ideas held by the people will have to be changed before a good climate for land subdivision regulation can be established. One of these basic beliefs is expressed in an oft-repeated phrase that goes something like this: "It's my land, and you can't tell me what to do with it;

⁵⁴ *Ibid.*

⁵⁵ Delafons, *supra* note 49, at 9.

⁵⁶ Harrow, "Report of the Executive Director," Planning 1965 343-45 (1965).

I'll do as I please." This is often punctuated with allegations to the effect that the planner or local official or plain citizen defending zoning or subdivision regulation really owes his allegiance to a country other than the United States and is a tool of those interests wishing to overthrow our government.

Adequate subdivision regulations and adequate enforcement require leaders educated to the benefits of subdivision control. An enlightened and enthusiastic general public is also vital. The people must see that their interests are best served when the community provides orderly development under proper controls. The interests of the general taxpaying public are not those of the subdivider who wants the community to subsidize his development. Education of our citizens to the benefits of planning generally, and subdivision regulation particularly, has not been successfully accomplished yet in many places, and it is going to take a lot of devotion and hard work to enlighten them and provide a good climate for planning. Planners will have to understand the economic and social realities and work within the existing political climate if we are to make suitable progress.

Evasion of Subdivision Regulations

Evasion of the subdivision regulations by developers should not be countenanced. Good legislation and vigorous enforcement of the subdivision regulations should eliminate most of the evasion, but the problem very often is a shortage of personnel to supervise subdivision activity which precludes a close watch on subdivision development.

This practice is extensive in scope and the evasive methods used are numerous and varied. The methods include: (1) plain refusal to obtain planning board approval of the plat, and recording it anyway;⁵⁷ (2) sale of lots by metes and bounds description;⁵⁸ (3) sale of lots by reference to unapproved and unrecorded plats;⁵⁹ (4) leasing a portion of a tract with an option to buy later, then, without planning board approval of the subdivision application, suing the owner for performance on the contract;⁶⁰ and (5) taking title to a sizeable tract in joint tenancy and later bringing suit to partition in an effort to have a fairly good sized subdivision without submitting to the provisions of the subdivision regulations.⁶¹ Finally, this observer has encountered an apparently unusual situation, one in which the owner of a large tract of land simply went into it and built houses, seemingly at random. He put in no roads and made no improvements prior to construction, and did not obtain planning board approval. He did not have to, because he did not sell these houses, he only rented them (he could sell them later on, of course). Therefore, no title changed hands and there was nothing to record. In this instance the county did not have a requirement that any new house constructed had to front on a public street, so this man could not be refused a building permit.⁶² The result

⁵⁷State v. Clark, 399 P.2d 955 (1965).

⁵⁸See pp. 218-229, Infra. for a full discussion of metes and bounds sales.

⁵⁹This practice is difficult to prove.

⁶⁰Popular Refreshments, Inc. v. Fuller's Milk Bar and Recreation Center, 205 A.2d 445 (1964).

⁶¹Pratt v. Adams, 40 Cal. Rptr. 505 (1964).

⁶²Far too many of our counties, particularly the rural and the less populated ones, do not even require building permits generally for new construction.

was an "instant slum," with buildings constructed of used materials and scraps, and with no streets or other improvements.⁶³ Yet this was a development - of sorts - of this land, and the machinery should have been available to the local authorities so that they could have prevented the occurrence of this kind of thing.

There are legal prohibitions on the sale of lots in unapproved subdivisions, and there are penalties for those who violate the rules. Generally speaking, in almost any jurisdiction with subdivision regulation an injunction will lie against an owner, or his agent, who is selling lots in an unapproved subdivision.⁶⁴

Compliance with the subdivision regulations is not always thus assured, however, even though that is the purpose of the injunction and penalty provisions in the subdivision control ordinances. One problem is the reluctance of planning commission members to get involved in legal action to enforce the regulations. Another problem is the reluctance of the city attorney or county attorney to sue out a writ to prohibit illegal sales.⁶⁵ A further problem relates to the measure of criminal punishment meted out to those who violate the subdivision regulations. Violation of the subdivision regulations is ordinarily made a misdemeanor, and conviction means a fine which is usually less than one hundred dollars. Some ordinances read that every sale of lots or every day of violation constitutes a separate offense, but this observer knows of no cases where any

⁶³This occurred in Anderson County, Tennessee.

⁶⁴County Council of Charleston v. Felkel, 137 S.W. 2d 577 (1964); Newark v. Padula, 94 A.2d 859 (1953); Aff'd 97 A.2d 735 (1953).

⁶⁵This writer encountered one situation in which lots in an unapproved and unrecorded subdivision were being sold but the town attorney refused to seek an injunction to prohibit the sales. It turned out that he was part owner in the tract!

substantial fine has been levied for violation of the subdivision regulations. A fine of \$75 levied for violating the regulations by selling lots in an unapproved, unrecorded subdivision in the case of State v. Clark⁶⁶ is probably very close to the typical fine in such instances.⁶⁷ It is easily seen that the prospect of incurring such fines would probably not deter very many people.)

As generally used, the system of fines is worthless; resort to equity to prohibit such sales is much the superior method if the local officials responsible are not reluctant to utilize it.

Landowners and developers try to evade the law for several reasons: to save money, to speculate with minimum investment, to prevent someone's telling them what to do with their land, to save time and trouble, or perhaps because they are ignorant of the law and the prescribed regulations and procedures. Poorly drawn laws surely provide a ready means of evasion for the shrewd subdivider. So, too, do metes and bounds sales.

The Problems of Metes and Bounds Conveyances

Metes and bounds sales of lots within subdivisions may be considered an administrative problem, of course, but it is in some states a problem of such magnitude and such far-reaching implications that it warrants special consideration.

⁶⁶399 P.2d 955 (1965).

⁶⁷Consider for example, the \$2 fine assessed against one developer for constructing a building in a zone that did not permit such use and without a building permit. Fines for violating the zoning, subdivision, or building regulations can be ridiculously low.

v A metes and bounds sale consists of a conveyance in which the owner legally describes a parcel of land. This is a perfectly legal and acceptable method of conveyance for large tracts of land. It is not, however, an acceptable method of conveyance for lots within a subdivision. It is permitted in some states, however, and when utilized provides a means for circumventing the subdivision regulations.

This problem plagues city officials and land planners "almost everywhere."⁶⁸ The owner can sell off individual parcels in a "subdivision" without benefit of recorded plat and thereby avoid meeting the conditions that the municipality imposes on new developments through its subdivision regulations. This is a cumbersome procedure, of course, but it does allow what the efficient administration of good subdivision regulations will not, namely the subdivision of land without regard to the overall good of the community. If a large number of small parcels are thus conveyed efforts at comprehensive public planning of land development are negated or frustrated. It is also certain that under such circumstances the owners of tracts of land who might be prospective subdividers will be unwilling to submit to the conditions of subdivision regulation that other developers have evaded.

One possible approach to the solution of the problem is available under an Oklahoma statute which provides that planning commission approval is necessary on deeds of transfer where a tract is divided into a few lots though a formal survey or plat is not required.

⁶⁸Beuscher, Cases on Land Use Controls 259 (3d ed. 1964).

... whoever, being the owner or agent of an owner of any parcel of ground, transfers, or sells, or agrees to sell, or negotiates to sell any tract of land of two and one half (2-1/2) acres or less where such tract was not shown of record in the office of the County Clerk as separately owned at the effective date of the regulations hereinafter provided for and not located within a subdivision approved according to law and filed of record in the office of the County Clerk, or if so located, not comprising at least one (1) entire lot as recorded, without first obtaining the written approval of the Commission by its endorsement on the instrument of transfer, shall be subject of the penalties of this Act provided; and such transaction shall be unlawful and the deed or other instrument of transfer shall not be valid, and if recorded, shall not import notice; and the description of such lot or parcel by metes and bounds, in the instrument of transfer or other document used in the process of selling or transferring, shall not exempt the transaction or the parties from such penalties or from the remedies in this Act provided.⁶⁹

Under this statute the planning commission is to apply the same regulations of these transfers as are applied to ordinary subdivisions, thus attempting to accomplish the same purposes. Beuscher notes that "Little seems to be known about the actual operation of this statute."⁷⁰

Another suggested approach to the metes and bounds problem is reliance on a "blue sky" statute. This would require real estate sales contracts to state that the land being sold did not front on a public street and would warn prospective land purchasers that the city had no liability or obligation to install utilities or make improvements.⁷¹ Such a statute would doubtless offer some relief and would tend to protect the buyer of the land.

⁶⁹Okla. Stats. 1953, Title 19, Sec. 862.

⁷⁰Beuscher, supra note 68, at 260.

⁷¹Cornick, Premature Subdivision 316 (1938).

Another approach, and one that is being used increasingly, is to include in the regulations a definition of subdivision that precludes metes and bounds transfers of subdivision lots. This method defines "subdivision" as a division of land into two or more tracts, and thus every division of land is included because there will be at least two parcels in any division of land. Then there must be a survey, a plat, and plat approval for each division.

This approach can bring on problems unless the law is carefully thought out and carefully worded. What about the trouble caused a man who wants to divide a large holding out in the county into two parcels? Will not the expense and delay involved for a man with only a few lots - three or four or half dozen - make this difficult for the legislatures and municipal officials to accept such a requirement?

Beuscher recounts the story of an attempt in Wisconsin in 1953 to deal with the metes and bounds problem. It illustrates "the caveats implicit"⁷² for those who might attempt to draft legislation to control metes and bounds sales. A metes and bounds bill was prepared by the state's director of regional planning, and was backed by the league of municipalities; it passed through the legislature without difficulty and was signed by the governor. This bill⁷³ applied only to lands located within cities and villages or within their respective planning jurisdictions, which extended one and one-half miles from the boundaries of villages and fourthclass cities and three miles for other cities. No conveyance by metes and bounds within this area would be recordable

⁷²Beuscher, *supra* note 68, at 260.

⁷³Chapter 35 of the laws of 1953.

unless (1) the parcel was surveyed according to requirements nearly as rigorous as those relating to subdivisions of five or more lots; (2) a map was prepared, as specified; (3) access to a public road was provided, minimum lot sizes were met, and, in case of land contiguous to lakes and streams, state board of health regulations were met; (4) the local governing body certified, on the map, compliance with the requirements; and (5) the certified map accompanied the instrument of conveyance when it was submitted to be recorded. Beuscher tells what happened after passage:

After a copy of the act had been circulated widely by the state bar association, loud cries of mortification were heard from the conveyancers, bankers, and realtors. The act was particularly offensive to the bar in that it required the title examiner to check to see whether or not all the terms of the act had been complied with, because without that the conveyance was void and title under it unmarketable. Besides, the minimum area and highway access requirements made no provision for the familiar transfer of a narrow strip of land by one neighbor to another for driveway or garage building purposes. And it was thought that the act threw an undue burden of administrative responsibility upon the register of deeds. In addition a great deal was made of the fact that the act attempted to regulate even the transfer of a single parcel. In any event at an adjourned session of the Legislature in October 1953, the law was quickly wiped off the books.⁷⁴

This does illustrate the difficulties involved in attempting to solve this problem.

The case of Kass v. Lewin⁷⁵ further illustrates the magnitude of the problem. The decision in this case and the reasoning of the court are important enough to require a thorough examination.

⁷⁴Beuscher, supra note 68, at 261.
⁷⁵104 So. 2d 572 (1958).

This case arose from the execution of a sales contract for two parcels of land in Dade County, Florida. Lewin was seller, and Kass was purchaser of the property. The parcels were described as follows:

Parcel 1: The East 100 feet of the S1/2 of the N1/2 of SW1/4 of SE1/4 in Sect. 26, Twp. 57 South, Range 38 East, situate in Dade County, Florida, being a parcel of land 100 feet by 330 feet in size; and

Parcel 11: Lots 3, 4, and the E1/2 of Lot 5, Block 9, Florida City Highlands, according to the plat thereof recorded in Plat book 20, page 36, of the Public Records of Dade County, Florida, being a parcel of land 125 feet by 117.55 feet in size.⁷⁶

Note that the first parcel is described by metes and bounds, and the second parcel involved a lot split.

Kass was advised by his attorney prior to closing the purchase that such a transaction was void and the contract, if executed, would not be admitted to record in Dade County,⁷⁷ due to the requirements of Chapter 25519, Laws of Fla. 1949, as amended by Chapter 30303, Laws of Fla. 1955.

Pertinent sections of the law will be set out fully here in order to obtain a clear understanding of the legislation involved. The title and sections 2, 3, 5, 6, 20 and 21 of Chapter 25519 read as follows:

Chapter 25519 -- (No. 523)

"Senate Bill No. 801

An Act Effective in Counties Having Population in Excess of 300,000 Population According to the Last or Any Future Official State or Federal Census Pertaining to Plats and Platting and Defining the Same; Requiring the Approval and Recording of Plats in Certain Cases; Prohibiting the Conveyance, Leasing Or Mortgaging of Lands, or Any Agreement with Reference

⁷⁶104 So. 2d 572, 576.

⁷⁷Ibid.

Thereto by Reference Solely to Plat Unless Such Plat Shall Have Been Approved and Recorded, and Making Any Such Prohibited Conveyances, Leases or Mortgages or Agreements Void and Prohibiting the Recording of the Same; Making It a Misdemeanor to Sell or Contract to Sell Platted Lands Unless a Plat Thereof is Approved and Recorded Except by Order of Court; Authorizing the Board of County Commissioners of Each County and the Governing Body of Each Municipality to Prescribe the Width of Roads, Streets, Alleys and Other Thoroughfares, and Setbacks Therefrom and to Name or Number the Same; Making Certain Requirements a Prerequisite to Approval of Plats; Providing Procedure For and Effect of Vacating Plats; Authorizing Board of County Commissioners of Each County and Governing Body of Each Municipality to Adopt Rules and Regulations to Effectuate Provisions and Purposes of This Act; Repealing All Laws and Parts of Laws in Conflict Herewith and Providing When This Act Shall Take Effect.

Be It Enacted by the Legislature of the State of Florida:

* * * * *

Section 2. Whenever the verb 'to plat,' in whatever tense used, is employed in this Act, the same shall mean to divide or subdivide land into lots, blocks, parcels, tracts, or other portions thereof, however the same may be designated.

Section 3. Whenever land comprising one acre or more is platted into lots, blocks, parcels, tracts or other portions, however designated, so as to comprise three or more such to the acre, a plat thereof shall be recorded in the Public Records of the County wherein such land lies.

* * * * *

Section 5. No lands shall be conveyed, leased or mortgaged nor shall any agreement be entered into providing for the conveyance, leasing or mortgaging thereof by reference solely to a plat thereof, unless such plat shall have been approved and recorded as provided by law.

Section 6. No conveyance, lease or mortgage or agreement to convey, lease or mortgage lands in violation of the provisions of this Act shall be recorded in the public records. * * *

Section 20. Any and all such conveyances, leases, or mortgages, or agreements to convey, lease or mortgage, or attempts to convey, lease or mortgage lands in violation of the provisions of this Act, made or attempted to be made hereinafter, shall be void ab initio.

Section 21. Any sale of or offer to sell or contract to sell any lot, block, parcel, tract or other portion of land, however designated, within the purview of this Act, unless the provisions of this Act shall first have been complied with, shall constitute a misdemeanor, and the person, firm, or corporation found guilty thereof shall be punished as provided by law. Each separate sale, offer to sell and contract to sell shall constitute a separate offense.⁷⁸

Chapter 30202, which amended Section 3 of Chapter 25519, read as follows:

Chapter 30202

Senate Bill No. 724

An Act amending Section 3 of Chapter 25519, Laws of Florida, 1949, relating to plats and platting in counties having a population in excess of 300,000 according to the last or any future official state or federal census, and other matters therein set forth, by requiring that plats of certain platted land be recorded in the public records of the county wherein such land lies.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 3 of Chapter 25519, Laws of Florida, 1949, is hereby amended so as to read as follows:

Section 3. Whenever any land, a plat of which has not been recorded in the Public Records of the county wherein the land lies, shall be platted into lots, blocks, parcels, tracts, or other portions, however designated, so that any of the same shall comprise one acre or less in size, and whenever any land, a plat of which has been recorded in the county wherein such land lies, is replatted into lots, blocks, parcels, tracts or other portions, however designated, so that any of the same shall comprise one-half acre or less in size, a plat thereof shall be recorded in the Public Records of the county wherein such land lies.⁷⁹

Both acts were passed as general, not special or local, acts. They were, however, population acts, applying only to counties within a narrow population bracket.

⁷⁸The sections quoted may be found at 104 So. 2d 572, 574-575.
⁷⁹Id. at 575.

The Florida Supreme Court stated that in passing on the validity of statutes it had to indulge in a presumption of constitutionality in favor of the act in question.⁸⁰ The court then proceeded to declare unconstitutional the sections of Chapter 25519 cited above.

The court considered Section 2 first, and found it unconstitutional on the grounds that ". . . recitals in the title of the act do not apprise a reader of normal intelligence that the body of the act gives such a strange, unnatural, and uncommon meaning to the verb 'to plat'."⁸¹ The court acknowledged that the title did recite that plats and platting were defined in the act, but held it gave no indication that the legislature intended to bring every conveyance which divided large parcels into smaller ones within the scope of the verb "to plat." The court found "The title is misleading and deceptive as to this Section and therefore Section 2 is Inoperative."⁸² It seems to this writer that a person of "normal intelligence" could understand Section 2.

The court next considered Section 3. It found this section to be "bad,"⁸³ and cited three reasons for its finding.

First of all, the court decided that its "reader of normal intelligence" would not realize that any conveyance that divided a parcel of land required a plat to be prepared, approved, and recorded. Here again, the titles of both acts were considered "deceptive."⁸⁴ This interpretation is certainly open to question. Titles mention the contents of a law in general terms only, not specifics. Here the reference in the title to the

⁸⁰Id. at 576-77.

⁸¹Id. at 577.

⁸²Id.

⁸³Id.

⁸⁴Id.

contents should be considered adequate.

The second item on this point was the court's holding that

. . . the imposition of the burden of preparing and recording a plat on the owner of land as a condition precedent to his conveying same is an unreasonable and unconstitutional restraint on the right to alienate property.⁸⁵

The court affirmed a point it made in an earlier case:⁸⁶

It is not necessary that a plat or a map of a person's property showing lots and blocks be recorded before it can be sold. It may be more convenient to sell by lots and blocks as was shown by a recorded plat, but the may sell it by the inch, the foot, or the yard, and describe it by metes and bounds.⁸⁷

The court got into difficult business at this point, by upholding an individual's right to convey property as he saw fit in the face of what has to be clear legislative intent to restrict that privilege under certain clearly defined circumstances.

The third point the court made concerning Section 3 was that it violated the equal protection clauses of state and federal constitutions. The court noted that the law exempted divisions of land into parcels of more than one acre, in case of land not platted, or, if the land were already platted, divisions producing parcels larger than one-half acre. The court held that there was no "reasonable classification" to justify the "discriminatory aspects" of this section.⁸⁸ One can take issue vigorously on this point. The general rule of law is simply that any provision must apply equally to all those who come under it in like

⁸⁵ *Ibid.*

⁸⁶ *Garvin v. Baker*, 59 So. 2d 360 (1952).

⁸⁷ 59 So. 2d 360, 365.

⁸⁸ *Id.* at 578.

circumstances. Thus, for example, lot sizes in some residential districts are required to be larger than in other districts. This is a reasonable requirement. There are many other examples. This writer objects to the court's interpretation of "equal protection" as applied to this decision.

The court considered Sections 5, 6, 20 and 21 together. Section 5 prohibited the conveyance of lands by reference solely to an unrecorded plat; Section 6 prohibited recording any such conveyance which violated provisions of the Statute; Section 20 provided that any conveyance made in violation of the statute was void ab initio; Section 21 made it a misdemeanor to offer to sell or contract to sell in violation of the statute.⁸⁹ The court indicated that the title and the body of the basic statute made it clear that the principle subject treated was plats and platting, but that the statute also embraced the subject of conveyances, their validity and recording of them. On this point the court held as follows:

While such instruments may as a practical matter utilize plats by referring to them in describing lands, the subject of recording of such instruments, their validity and use as a means of exercising the right to sell or pledge real property is not either germane to or incidental to the subject of subdivision control, traffic planning or the other public purposes to be accomplished by requiring approval of plats by public bodies before they may be recorded.⁹⁰

It is more than a little difficult to accept the court's reasoning on this point. The court said further that since the Florida Constitution prescribed that each law enacted by the legislation should "embrace but one subject and matter properly connected therewith"⁹¹ and since these

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Section 16, Art. III, Fla. Const.

sections violated this provision they were null and void.⁹²

Continuing its discussion of these sections the court held that they ". . . place an unreasonable restraint on the right of alienation of property."⁹³

The word "property" in the Fourteenth Amendment to the U.S. Constitution includes the right to acquire, use and dispose of it for lawful purposes, and the constitution protects each of these essentials. Buchanan v. Warley, 1917, 245 U.S. 60, 38 S. Ct. 16, 62 L.Ed. 149. The owners of land are thus protected against the arbitrary, capricious or unjustly discriminatory action of the state relating to the right to acquire, use and dispose of land.⁹⁴

The court acknowledged the police power of the state, and related the general principle that any exercise of the police power must be based on a substantial relation to health, safety, morals, or general welfare of the people. The court did not, however, find this relation in Sections 5, 6, 20, and 21.

We do not find any such consideration in the subject matter of these sections of the Statute that warrant the requirement that plats be filed as prescribed in Section 3, as amended, or that the instruments mentioned in Sections 5, 6, and 20 of the statute be denied recordation and held to be null and void, or that the acts described in Section 21 should constitute a misdemeanor.⁹⁵

Accordingly the court struck down Sections 2, 3, 4, 5, 6, 7, 20, and 21 of Chapter 25519, and all of Chapter 30202.

After thus gutting this statute, the court did concur in the argument by the appellant that it was the clear intent of the legislature in this statute to promote community planning, and stated that insofar as this purpose could be accomplished by plat control ". . . it may be done

⁹²104 So. 2d 572, 578.

⁹³Ibid.

⁹⁴Ibid.

⁹⁵Ibid. at 279.

under what remains of this statute."⁹⁶ Obviously very little remained. The heart of the statute was invalidated.

If the reasoning of this court, generally, is hard to accept, it must be remembered that the climate for planning has not been favorable at all.⁹⁷ One must conclude that the court in this decision was obviously oriented towards the sanctity of property. Planning and the use of the police power to regulate conveyance of land in order to promote orderly development come off a distant second in this confrontation. It is hoped that a subsequent case on this kind of statute will find a court more impressed with the needs of the whole community; a court that can accept the use of the police power of the state, when expressed in a rather clear statute, to regulate the sale of land that would otherwise undercut subdivision regulations; and a court more closely attuned to the complexities of the modern world that demand modification of some of our traditional personal rights for the good of our fellows in society. Many of the courts across the land are cognizant of these factors and have stamped the seal of judicial approval on various police power measures that only a short time ago would have been unthinkable.⁹⁸

In Florida and in other states where metes and bounds sales are not controlled this presents a crucial problem. Subdivision regulations

⁹⁶ ibid.

⁹⁷ An egregious illustration of this fact is Florida's lack of general legislation to allow cities or counties to plan, counties to zone, or cities and counties to regulate subdivisions.

⁹⁸ The Florida Supreme Court should have realized as a practical matter that heavy reliance on conveyance by metes and bounds will clutter the books of the register of deeds and burden that office unduly. Alan Realty Co. v. Fair Deal Investment Co. held that the aim of statutes requiring sale by reference to plats was to facilitate easy and adequate description of land in the registers' offices by preventing metes and bounds descriptions of many small tracts of land. 73 N.W. 2d 417, 519 (1955).

are easily evaded and their importance undermined. Local officials are forced to look to other means to prevent conveyance and development of raw land.

There is one approach to the problem of controlling metes and bounds sales that has some merit. This method is based on refusal of building permits to the owner unless reasonable planning conditions are met.

Brous v. Smith⁹⁹ involved a statute providing that before a permit for the erection of a building was to be granted the street or highway upon which the building abuts

. . . shall have been suitably improved to the satisfaction of the town board or planning board, if empowered by the town board in accordance with standards and specifications approved by the town board, as adequate in respect to the public health, safety, and general welfare for the special circumstances of a particular street or highway.¹⁰⁰

Brous, a developer, took title to some 850 acres of land which has been platted many years before, but not improved. Some parts of this tract abutted on highways, and some did not. Brous desired to build houses on six of these "lots" back of the highway, facing "paper streets."¹⁰¹ Smith, the building inspector for the town of Islip, refused on the basis of Town Law 280-a, referred to above.

The court, in supporting the building inspector's decision and upholding the validity of the statute, showed a wonderful understanding of the real need for such authority to control land development.

⁹⁹106 N.E. 2d 503 (1952).

¹⁰⁰106 N.E. 2d 503, 505.

¹⁰¹106 N.E. 2d 503, 504.

The challenged regulation is an enactment in that important field of legislation concerned with the problem of community planning and designed to secure the 'uniform and harmonious development in the growth' of our villages, towns, and cities.¹⁰²

Realization by the courts of the need for harmonious, orderly development is always welcome.

The court went on to say that the state legislature had made a decision on the wisdom of allowing unimproved areas to be developed without certain basic needs:

The statute reflects a legislative judgment that the building up of unimproved and undeveloped areas ought to be accompanied by provision for roads and streets and other essential facilities to meet the basic needs of the new residents of the area.¹⁰³

This court, unlike the Kass court, was loath to question legislative judgment in this case.

Continuing, the court's opinion pointed out some of the problems involved in the sale and use for building sites of raw land:

We all know that where subdivision of land is unregulated lots are sold without paving, water, drainage or sanitary facilities, and then later the community feels forced to protect the residents and take over the streets.¹⁰⁴

The court held that the legislature was able to prevent such poor development, that the statute was valid, and that construction of roads or posting of performance bonds was necessary in order for Brous to develop his land.

¹⁰²106 N.E. 2d 503, 505.

¹⁰³106 N.E. 2d 503, 506.

¹⁰⁴106 N.E. 2d 503, 506, quoting Bettman, City and Regional Planning Papers 74 (1946).

Where adequate roads have not been constructed at the time of subdivision - here, because the plat was filed and recorded long before the development of modern planning legislation - the builder, before he may obtain a building permit, must lay such streets and highways as are necessary to render his dwelling accessible to the outside world. There can be no doubt, in light of the importance of such means of access, that the regulation is reasonable and valid.¹⁰⁵

The court pointed out that access was important in cases of emergency, whether fire, sickness, accident or other catastrophe, and mentioned the relation of such requirements to public health, safety, and general welfare.¹⁰⁶

This case is a most important one because it offers a means of coping with the development of land platted years before planning and subdivision regulation became operative, and with land transferred by metes and bounds generally. The point needs to be made that there are large numbers of these "paper" subdivisions, platted long ago, and, without legislation such as that in the Brous case, a municipality is unable to cope with the problem of controlling development of such lands.

This kind of statute may be criticized on the grounds that it really offers only a partial solution. It requires improvements for the land involved, but it works to penalize the purchaser, not the seller,¹⁰⁷ and is, therefore, not wholly satisfactory.

An answer to this contention is that the purchaser of such a tract, like any other subdivider, should be required to make the necessary improvements. If he does not care to do so, he can still sell his tract undivided.

¹⁰⁵106 N.E. 2d 503, 506.

¹⁰⁶Ibid.

¹⁰⁷Beuscher, supra note 68, at 259.

Extraterritorial Jurisdiction

The matter of extraterritorial jurisdiction is a legal and an administrative problem. It is a problem of immense proportions and one that must be successfully confronted if our communities are to enjoy orderly growth.

We live in an era increasingly dominated by urban centers of population. It is not the cities themselves which are growing; they are restricted by unrealistic corporation limits that reflect no political or social or economic entity. Instead, the population spills over on the fringes of the cities and it is here that the rapid growth is and has been occurring.¹⁰⁸

This fact of modern life has serious implications concerning the development of our cities and urban centers. Cities, quite naturally, have an immense interest - a vested interest - in the kind of development that takes place on their fringes. These fringe areas are likely to become a part of the city one day, and if development of these areas is poor and undesirable it will cost the city economically and socially and in many other ways. Cities, therefore, ought to have something to say about the way fringe areas that will eventually become part of the city are developed. Cities should express and try to carefully protect their interest in these areas.

It will be seen readily that since the development is occurring largely on the city fringes, subdivision regulations that do not have legal force outside a municipality's corporate limits are of little value.

¹⁰⁸Beuscher, supra note 68, at 239.

Many of our cities have tried, in a variety of ways, to regulate at least a part of their urban fringes. Many cities have tried to plan for an entire urban or metropolitan area, not just for the city inside the city limits. To what extent can a city plan for an entire metropolitan area when its boundaries are not coterminous with that area? It can plan all it wants to, because planning does not involve direct action and, therefore, legal consequences. It is hard to see how a court could strike down planning, which is the formulation of municipal policy and not any overt action which would provide the basis for adjudication. "Accordingly, planning for territories beyond the corporate limits may be said to be as valid as planning for land use within the boundaries."¹⁰⁹

The real question is not whether cities can plan for fringe area, but whether cities can effectively plan for metropolitan areas which spread beyond the municipality's corporate limits. Extra-territorial planning may be "legal" but is ineffective unless overt actions are taken to implement it. At that point these overt acts -- zoning ordinances, subdivision regulations and other land use controls -- can be and are challenged in court.

Let us consider zoning first. Today the fringe areas of American cities are poorly regulated by zoning restrictions. Most cities of 5,000 population and above have comprehensive zoning regulations, but only for the area within the corporate boundary. Few cities attempt to zone outside their city limits.¹¹⁰ In a 1954 survey of 174 cities it was

¹⁰⁹Sengstock, Extraterritorial Powers in the Metropolitan Area 61-62 (1962).

¹¹⁰Id. at 65.

learned that 85 per cent of the cities from 5,000 to 100,000 and over had a comprehensive zoning ordinance, but that only 9 per cent of them had authority to zone outside the city.¹¹¹

Only a few states have granted extraterritorial zoning powers to their cities. The American Society of Planning Officials stated in 1952 that Alabama, Indiana, Kentucky, Nebraska, North Carolina, South Carolina, Tennessee and West Virginia granted to one or more of their cities authority to zone areas outside the city limits.¹¹² Their extraterritorial authority ranged from one to five miles beyond the municipality's boundaries.

Despite the apparent reluctance of states to grant extraterritorial authority to their cities, the legality of this grant cannot be questioned seriously, for the courts have held in a number of cases that the state legislature may grant extraterritorial regulatory powers to municipalities for a reasonable distance beyond their boundaries. The Supreme Court of North Carolina found in Raleigh v. Morand,¹¹³ for instance, that zoning laws are enacted under the police power, and the legislature's power to grant to cities jurisdiction for sanitary or police purposes of territory beyond the municipal boundaries cannot be doubted.¹¹⁴

There are other cases upholding extraterritorial jurisdiction, in Schlientz v. North Platte,¹¹⁵ the Nebraska Supreme Court upheld the

¹¹¹Bollens, "Controls and Services in Unincorporated Urban Fringes," Municipal Year Book 53-55 (1954).

¹¹²American Society of Planning Officials, Extraterritorial Zoning 6 (Planning Advisory Service Rept. No. 42, 1952).

¹¹³847 N.C. 363, 100 S.E. 2d 870 (1957).

¹¹⁴Sengstock, supra note 9, at 64.

¹¹⁵110 N.W. 2d 58 (1961).

validity of a statute authorizing the exercise of zoning powers within three miles of the municipal limits. Here the court stated: "The legislature may, and often does, expressly or by implication, grant to municipal corporations the right to exercise police power beyond and within prescribed distances of the municipal limits." ¹¹⁶

Clearly, the state legislatures can grant planning commissions authority to approve plats of land in areas beyond corporate limits, thus exercising extraterritorial jurisdiction over subdivision. An early case in point, Prudential Co-op. Realty Co. v. Youngstown,¹¹⁷ involved the city of Youngstown, Ohio, and its requirement that to record a plat in Youngstown or within a three mile limit a realtor had to have city planning commission endorsement of his plat. Prudential Cooperative Realty Company purchased two parcels of land within the three mile limit and was required to pay \$1,593 in fees as a condition to approval. The company paid under protest, and contended in its suit that the legislature acted unconstitutionally in authorizing municipal control of extraterritorial platting.

Plaintiff contended that the legislature was powerless to intervene when suburban owners built narrow street and "other obstructions without limits," but the court replied that such a statement ". . . is a travesty on justice and government,"¹¹⁸ stating that the Legislature gave municipalities certain regulatory authority because it recognized the mutual interest of cities and surrounding territory.¹¹⁹

¹¹⁶110 N.W. 2d 58, 68.

¹¹⁷118 Ohio St., 204, 160 N.E. 695 (1928).

¹¹⁸160 N.E. 695, 698.

¹¹⁹Ibid.

We entertain no doubt of the power of the legislature to confer authority upon the planning commission to examine and to check plats of lands located outside of a city within a limit of three miles, and to refuse to endorse its approval thereon, and we entertain no doubt of the validity of the statute which forbids a plat to be recorded without such endorsement.¹²⁰

The Ohio Supreme Court found that

... the justiciable question is whether the regulatory authority conferred has a reasonable relation to the governmental purpose to be served. If it has such reasonable relation it becomes only a question of legislative wisdom with which the courts have no concern.¹²¹

The court denied Prudentia's claim and upheld the enabling legislation in the broadest of terms.

In Petterson v. Naperville¹²² the Illinois Supreme Court held that cities may be authorized by the state to exercise their powers outside the corporate limits.

Cities ordinarily have no jurisdiction beyond their corporate limits, and municipal ordinances are confined in their application to the territory of the municipality adopting them. . . . But the Legislature may, if it sees fit, confer special extraterritorial powers on municipalities and when it does so the courts recognize and give effect to them.¹²³

The court pointed out that there was nothing to prevent a county's having its own subdivision regulations, but that the legislature had granted to municipalities which had adopted an official plan exclusive jurisdiction over the subdivision of lands located not more than one and one-half miles beyond the municipality's corporate limits.

¹²⁰ ibid.

¹²¹ ibid.

¹²² 111. 2d 233, 137 N.E. 2d 371 (1956).

¹²³ 137 N.E. 2d 371, 377.

Thus, even though the County of Du Page adopted a resolution regulating subdivision in the county, the lands in question here, being within the limits prescribed by the City Plan Commission Act and the subdivision control ordinance, are subject to the exclusive control and jurisdiction of the City of Naperville so far as the subdivision of lands and the approval of maps and plats of such subdivision are concerned.¹²⁴

The court concluded that the exercise of extraterritorial powers is always subject to the requirement that an ordinance passed pursuant to legislative authorization constitutes a valid exercise of the police power and exhibits a reasonable relationship to the public health, safety, or general welfare.¹²⁵

Given legislative authorization for it, extraterritorial subdivision control can be exercised by a municipality. On the constitutional question Sengstock makes this statement:

Recording a plat is not a right but a state granted statutory privilege. If the state conditions the privilege in a reasonable manner no claim of unconstitutionality would be seriously entertained.¹²⁶

This is an accurate statement, and is based on the court's reasoning in the cases discussed. The authority of a state legislature to grant extraterritorial subdivision jurisdiction to municipalities cannot be doubted.

There is some question about what is a "reasonable distance" to extend regulatory powers. The Standard City Planning Enabling Act recommended that municipal planning commission jurisdiction extend five miles past the city limits,¹²⁷ but not many states allow their cities that much

¹²⁴137 N.E. 2d 371, 377-378.

¹²⁵137 N.E. 2d 371, 377.

¹²⁶Sengstock, supra note 9, at 68.

¹²⁷U. S. Dep't of Commerce, Sec. 12 (1928).

extraterritorial jurisdiction. Many people would agree that "Unnecessarily restricted mileage limitations have been grafted onto these powers."¹²⁸ It has been pointed out that three states have imposed a limitation of one mile,¹²⁹ two states a one and one-half mile limit,¹³⁰ fourteen states a three mile limit,¹³¹ five states a five mile limit,¹³² and two states a six mile limit.¹³³

The exercise of extraterritorial authority for one, one and one-half, three, or even five or six miles will not prove to be a panacea. There will still be development beyond this area of jurisdiction, and much of it scattered out in the hinterland is particularly likely to be shabby and ill-conceived and poorly constructed.¹³⁴ Sengstock says that "A revision of these restrictions should be effected in the light of the growth of the metropolitan area beyond the corporate limits."¹³⁵

Granting cities extraterritorial jurisdiction within the limits now advocated is some help in promoting a city's orderly growth and development, but problems still remain.

The first situation is that in which there is not just one city and one county involved, but a plethora of municipalities and other governmental units in the area. This obviously could lead to conflicts

¹²⁸Sengstock, supra note 9, at 68.

¹²⁹Maryland, North Carolina, Idaho.

¹³⁰Illinois and Wisconsin.

¹³¹Arizona, California, Colorado, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, South Carolina, Minnesota, South Dakota, Virginia, Wisconsin, Ohio.

¹³²Alabama, Arkansas, Kentucky, Tennessee, and Texas.

¹³³North Dakota and Oregon.

¹³⁴See Chapter IV.

¹³⁵Sengstock, supra note 9, at 69.

in planning, particularly with respect to zoning and subdivision regulation. The existence of other governmental units would not always be a particularly imposing problem, and adequate legislation can provide a means of circumventing it.¹³⁶ Consider, however, the situation in the Syracuse Metropolitan area, and the number of people and agencies involved in development supervision:

One who would engage in real estate development in the Syracuse Metropolitan area must be prepared to deal with a wide variety of governmental units and agencies. The federal government is represented principally by the Federal Housing Administration and the Veterans Administration. Among state agencies the Conservation Department, Department of Public Works, Health Department, Water Pollution Control Board, Public Service Commission, Department of Audit and Control, and Traffic Commission are those most frequently involved. The City of Syracuse is so close to the scene that its Mayor and Common Council sometimes take a direct hand; while its Planning Commission, Board of Zoning Appeals, Engineering Department, and Department of Public Works may figure in a developmental project in a number of ways. The same may be said of Onondaga County and its Board of Supervisors, and of such county agencies as the Regional Planning Board, Water Authority, and Public Works Commission. The 19 town and 15 village governments take an active interest in such development as may concern them, notably (though by no means exclusively) through their 23 planning boards and 25 boards of zoning appeals. Finally, there are 417 special town improvement districts, among which in the present context the water and sewer districts are most important. There is, then, no dearth of governments concerned with such developmental factors as planning, zoning, and subdivision regulations, water supply, sewage disposal, and streets and roads.¹³⁷

This quotation, although rather lengthy, warrants inclusion here because it is so illustrative of the unbelievable complexity of the local government pattern in metropolitan areas today. As Professor Daniel Grant has said, ". . . the political map does not reflect modern economic,

¹³⁶The State of Tennessee, as one example, has good legislation on this point. See Tenn. Code Anno. 13-204, 207; 13-711.

¹³⁷Martin, Decision in Syracuse 240-241 (1961).

technological, and social realities. . . ."¹³⁸ The lot of the land developer in such a situation is not particularly an easy one. Neither is that of those responsible for land development policy, regulation, and administration, because of the vast number of agencies and policies involved. Here extraterritorial subdivision control by a central city may be rendered valueless because the central city does not, and cannot under the circumstances, have jurisdiction over all that should be under its purview.

The second basic situation is that in which only a city and a county are involved. The city will have extraterritorial subdivision control powers but they do not extend far enough from the corporate limits to be effective. A majority of the states that have granted extraterritorial subdivision powers to their municipalities have imposed a limitation of five miles or less from the municipal boundary. Most of the smaller towns will have a limitation of much less, but even the five mile restriction will not be adequate for the larger cities. The extraterritorial subdivision regulation will often not achieve the desired result because leapfrogging will occur. This means that the subdividers will simply buy and develop land far enough out that it is not subject to the extraterritorial subdivision regulations of the municipality.

Leapfrogging is a practice to be abhorred. It bypasses land close in that should be developed first; a city that attempts to service with utilities a development so far out can be financially burdened; and it often develops land for residential use when it should be used for other purposes.

¹³⁸U. S. Dep't of Agriculture, A Place to Live 254 (1963).

This problem could be averted if counties exercised sufficient authority over subdivision activity. Often counties do not regulate subdivisions at all; when they do they too often regulate on the basis of minimum standards. In either case the county is of little assistance to the city in its efforts to influence the development of fringe areas.

In this kind of situation usually there is no subdivision activity within the city limits, and very little activity within the area where the city exercises extraterritorial jurisdiction over subdivisions. The end result is a vacuum, an absence of authority where the bulk of the land subdivision occurs, and subdivision regulation as a tool does not perform as it could to control development.

The problem of extraterritorial subdivision control, in summary, is this: (1) some cities cannot exercise control outside their corporate limits, and here subdivision regulations are of little value, because little subdivision occurs within the city; (2) other cities are restricted to an unreasonable limit within which they can regulate subdivision; and (3) some of the larger cities find themselves hampered in their control because of the existence of other governmental units, which diffuses authority, and the city has no control over the area of its logical jurisdiction. In all these situations the technique of subdivision regulation is not as effective as it could be.

The solution to this problem is not difficult. It requires no breakthroughs, no new legal or administrative techniques. It does require (1) that all cities be granted extraterritorial jurisdiction over subdivisions; (2) that counties exercise subdivision control with regulations closely approximating the standards found in the city's regulations; and

(3) that large metropolitan areas have one governmental body with boundaries encompassing the whole area, and with authority over that whole area. These things would clear away the problems we now face.

The simplicity of this solution belies the existence of a major difficulty. This difficulty is the opposition of those who would be regulated. The protest of people who live in the fringe areas and who are or who would be regulated if subdivision regulation were extended has already been heard. Professional planners encounter it regularly. To planners and students of government it seems imminently logical to allow a city some control over development of fringe areas that will eventually become a part of the city:

Obtaining the approval of the planning commission of a nearby city as a condition precedent to recording a plat is not unreasonable if it is borne in mind that cities do expand their boundaries with the passage of time.¹³⁹

However, those who are or would be regulated to some extent by a city in which they do not live,¹⁴⁰ . . . are apt to protest vigorously against 'regulation without representation'.¹⁴¹ This charge, still often heard, is of doubtful validity. After all, these fringe area residents do have a part in the election of representatives to the state legislature, which is the body that grants this particular authority to cities.

The grant of extraterritorial subdivision powers to cities can give them

¹³⁹Sengstock, supra note 9, at 68.

¹⁴⁰The chances are that those who live in the fringe areas are dependent on the city for employment, community facilities, and various goods and services. There are a number of important things that they need from the city.

¹⁴¹Green, Planning Law V:40 (1962).

... a reasonable voice in the development and improvement of lands which at some future time will probably or even possibly be sufficiently developed and occupied by residential or business structures to justify their annexation.¹⁴²

This brings up an area where many municipalities have been lax.

Annexation

Logical annexation policies would be a great help to our municipalities desiring to really control land subdivision. It is this writer's observation that far too many of our municipalities pursue rather illogical annexation practices - if they annex at all. Immediate annexation of the fringe areas as they develop would, of course, push the limit of extraterritorial jurisdiction farther and farther out.

While aggressive annexation policies would help, the real problems still remain. The problem of proper organization for our huge, sprawling metropolitan areas is a critical concern of students in many fields, but here, as well as in the matter of increased standards for county subdivision regulations or extended limits for municipal regulations, the problem is still one of educating the people and their duly elected representatives to the necessity and the means for change.

¹⁴²Norfolk County v. Portsmouth, 186 Va. 1032, 45 S.E. 2d 136

CHAPTER VIII

TIMING AND LOCATION CONTROL

Progress in the area of subdivision control has been made over the last several years, and prospects are reasonably good for judicial acceptance of some of the newer requirements being imposed, such as those relating to park and school sites. It must be recognized, however, that subdivision control is still in its infancy, and that it ". . . has not yet moved much beyond a method which insures that adequate site improvement will be provided at minimum standards." ¹

Subdivision legislation and control ordinances are not sufficiently sophisticated to allow communities to regulate much more than the internal aspects of each subdivision. As Belser has pointed out

The result of our unpreparedness to meet problems of urban dispersal is that regulations have not kept abreast of the development pattern in most of the great metropolitan areas where people have concentrated at a very rapid rate. ²

This is extremely unfortunate. Land subdivision is the single most important factor in guiding growth and developing the community pattern, and it is vitally important that our communities be able to exercise control over where and when subdivision actually takes place, as well as

¹Mandelker, "What Open Space Where? How?" Planning 1963 25 (1964).

²Engelbert, ed. The Nature and Control of Urban Dispersal 3 (1960).

regulating the physical improvements necessary in them. The lack of legal authority to control timing and location of development activity has been decried by many students of the urban scene. It has been said that

. . . the control that is being exercised at the present time is of such a limited nature as to be concerned only with the internal arrangements of subdivisions themselves. In fact, we know how to subdivide quite well. . . . We have not, however, given much thought to where the subdivision was located or to the problem of making available the facilities of urban living. Neither have we thought of the full development of the area and the possibility of overextending the lines of communication and producing an uneconomic community.³

It is this last sentence that gets to the matter of why the present subdivision controls are insufficient, and why regulation of timing and location are vitally necessary.

Our subdivision regulations primarily regulate design, establish standards for streets and utilities and provide the procedure for plat approval. We, therefore, get pretty good subdivisions these days -- under those circumstances where the legislation and ordinances are adequate and the administration of the regulations is vigorous and impartial -- but the timing and locating of these subdivisions cannot be considered by the planning boards in their review of the plats. This is not because the planning boards and their staffs are loath to consider such matters, but because the legal basis for doing so is lacking.

This writer submits that subdivision regulations will not be meaningful in terms of meeting urban problems until legal authority over timing and location is established and such controls are effectively administered.

³ Ibid.

Generally speaking, municipalities cannot exercise jurisdiction over the area of their influence, the area they should be responsible for. They cannot control where a subdivision goes or when. Except for a few regulations that prohibit development on unsuitable terrain - swampy land, flood plains, or hillsides subject to slides - a subdivider can develop whenever and wherever he pleases. His only limitation is that he must subdivide as the local government tells him how - if he elects to subdivide an area subject to regulations.

Failure to control the where and when of subdivision produces results similar to these:

Unregulated physical growth has destroyed much economic value in many metropolitan areas. In Santa Clara County, for example, 10 per cent of the area which is developable has been developed in the last fifteen years. The remaining 90 per cent of the area, however, is prematurely prejudiced in favor of urban development because of the fact that the distribution of the 10 per cent is over the entire area and has occurred in a completely unregulated manner. This is a common phenomenon. Everyone who is involved in regulating growth in any jurisdiction can recognize this pattern. . . .⁴

This example is not only pertinent to large metropolitan areas, but to all urbanizing areas in the country.

It has been suggested that local governments should regulate the timing and location of subdivisions in order to (1) secure economy in the provision of municipal services and facilities; (2) maintain these services and facilities at a high level; (3) control the character of development; (4) maintain a desirable balance of land uses; and (5)

⁴ ibid.

thus protect the public interest.⁵ These are logical and laudable objectives. The question is how to obtain and how to utilize these controls.

Assuming that a municipality wishes to control timing and location, as well as the quality of subdivision, it can use one or more of the following methods.

Direct operations

The primary factor involved in direct operations in this area by the local government would be the public ownership of land. Public ownership of land has been recommended occasionally as a solution to the whole problem of providing orderly urban growth. James Ford is one who has recommended it, as indicated by this statement:

Extension of public ownership of land is necessary to avoid recurrence of the evils of exploitation of land against the public interest. . . . Land is a proper field for government ownership. . . . Public Interest is paramount. Government ownership is better. . . .because it eliminates the pressure of selfish speculation, jockeying, and corruption, which are against the public interest.⁶

It has been suggested that the city buy land around its perimeter for parks and other public uses; that it buy additional land in and around the city, reselling it a little at a time, subject to proper restrictions; that it buy land which it would lease for private use, subject to proper lease conditions; and that it buy "development rights."⁷

⁵Reginald R. Walters, Subdivision Control with Emphasis on Location and Timing 16 (Unpublished MCP Thesis, Georgia Institute of Technology 1956).

⁶Ford, 11 Slums and Housing 841 (1936).

⁷Green, Planning Law XIV:39 (1962).

It is difficult to believe that many people today take seriously proposals for governmental acquisition of large parcels of land which would be leased or sold in an orderly, timely fashion. The American people have accepted the idea of government owned and controlled housing, but only for lower income groups. This is rather a far cry from extensive public land ownership other than for public purposes, such as education and recreation. This is not to say that this attitude will never change, but Americans believe too strongly in the sanctity of private property to take very seriously government ownership at the scale suggested.

It must be noted, moreover, that, as a practical matter, our local governments are not ordinarily in a financial position to be able to buy very much land. They are short of money, often due in part to past mistakes relating to the extension of urban services to subdivisions all over creation, and they are going to be under continuing financial pressure in the future as demands increase.

This writer believes wholeheartedly that cities and towns should acquire land in advance for various public uses in accordance with a comprehensive plan for development, but does not accept the desirability or practicality of relying on extensive public land ownership to achieve control over timing and location of development.

Guiding development by utility policies

The control of municipal utility systems is a potentially significant means of guiding the course of community growth, both in the city

and in the surrounding areas. As Philip Green as said, this control may be used in two principal ways:

First, it is extremely costly to serve the scattered and haphazard development which frequently takes place in outlying neighborhoods. To encourage more or less complete utilization of one area before development begins in the next, some cities have set up a schedule for the extension of services to particular areas and have refused to extend services to other areas until each area served has been built up to an appropriate level.⁸

This is exactly how utility extension should be used to positively influence growth. "If a logical extension of public services could be provided, much of the problem of urban dispersal would be solved."⁹

Green goes on to say that since heavy users of water (such as manufacturers) are completely dependent upon the availability of water in choosing their sites, the type and degree of development in particular areas may be influenced by control over the water system. This is not necessarily the case with residential development, as we shall see.

Green continues to his next point:

Secondly, control of water and sewerage systems gives the city a means of persuading developers to comply with subdivision regulations without the necessity of taking them to court: the developer who does not comply is simply not permitted to tap on to water and sewer lines.¹⁰

Green also pointed out that a number of cities have used utility control to encourage annexation of outlying areas by a policy of providing water and sewer service at a cheaper rate inside the city.

This is well and good, but there is still a problem unless the city has such an extensive extraterritorial jurisdiction that its utility

⁸Id. at VII:38.

⁹Engelbert, supra note 4, at 3.

¹⁰Green, supra note 7, at VII:38.

extension policies and subdivision regulations cannot be evaded. In most cases, however, the developer need only obtain land outside the city's corporate limits or the limits of its extraterritorial jurisdiction, put in wells and septic tanks, and worry naught for the city's policies and regulations -- or for its overall development.

Very often too, one finds that special utility or sanitary districts are established to provide water and sewer services in such areas. Originally the purpose in such utility districts was to provide urban services for residents of areas not served by a municipal system. The operation of these special districts has shown that they only cause further problems for municipalities, and they appear to be in disfavor now, at least with municipal officials and their spokesmen. The problem is that these districts provide water and sewer facilities and thus take away the city's power to persuade developers to comply with the subdivision regulations. Further, residents of areas served by water and sewerage by a utility district enjoy most of the services that cities have traditionally provided, and they oppose the annexation of their area into the city. The problem is compounded by private companies which also furnish utilities. Providing utility services, whether by a city, by a special district, or by a private utility company, to fringe areas, instead of producing a climate favorable to annexation, has the opposite effect. 11

Utility extension planning is a technique for guiding growth that has not been utilized to full advantage. Since the availability

11Sengstock, Extraterritorial Powers in the Metropolitan Area 23 (1962).

of water and sewer in urban and urbanizing areas is one of the major factors in determining the location of future residential, commercial, and industrial development, it is the responsibility of municipalities to plan for the extension of these facilities in such a way as to promote growth in the proper areas and defer it in areas less ready for development. To do this logically requires the preparation of a program for expansion of the utility systems. Such a program would include maps showing proposed future extensions and a priority schedule, by areas, for water and sewer line construction.

Utility extension planning, as it is discussed here, does not refer simply to engineering matters, nor does it relate only to responding to the existing unserved development, though this is where the demands are usually generated and the areas to which the systems are usually extended on a catch-as-catch-can basis. Instead, a utility extension plan is one of the real tools that is available to local officials for implementing comprehensive plans for land development and population distribution. The results of inadequate planning and shortsighted policies for the distribution of water and sewer facilities in the past are evident in so many of our cities, particularly in the fringe area problems thus occasioned in the majority of them.

The fringe areas have no way to compel the city to supply these services, because "The core city cannot be compelled to extend municipal services beyond its corporate limits; statutes merely authorize it to do so at its own discretion."¹² The city's purpose is to provide

¹²Id. at 71.

for the welfare of its inhabitants, those who support it. Those who choose to live outside it do not support it, and have no right to its services. Certainly they have no right to expect the city to expose itself to undue financial pressure in order to provide them with facilities and services of a traditionally urban nature.

Some of our cities, responding to the revenue potential of the water system, have extended utility systems without reliance on a sound plan, and have thus reduced the effectiveness of utility extension as a planning tool.

The controlling factor in utility extension must be the economical provision of public services. This means that the services must be extended logically, that scattered subdivisions must be shunned in favor of contiguous tracts, and that the city, based on a sound plan for extension, will place these utilities so as to guide development in accordance with the comprehensive plan. The city must not subsidize subdivisions a long distance from town, thus casting the burden on the taxpayer, extending itself financially, and wrecking its development plan. The plan adopted for utility extension should be so devised that it will be profitable for subdividers to build only in high density areas, and should require that

. . . new development take place only where there is an adequate range of community facilities and public services. This is frequently based on the authority of the public health department, which is often more influential than the planning department. Several cities require that all new residences be linked to the public sewer system or water supply. New development can then be programmed in relation to an orderly extension of these services. . . .¹³

¹³Delafons, Land Use Controls in the United States 67 (1962).

If a municipality has a sound plan for utility extension, backed up by police power regulations preventing development without connection to the municipal systems, then that municipality is in an excellent position to determine the character of its development.

The policy should be to (1) choose sites for major public facilities, such as parks, schools and hospitals, with a view toward encouraging growth in those areas; (2) furnish utilities only on schedule; thus encouraging subdivision in some areas and discouraging it in others, depending on the availability of these services; and (3) rely heavily on subdivision regulations to cover the development costs.¹⁴

It must be noted that a utility extension policy is not a regulatory policy, but does require the existence of certain regulations in order to prevent development independent of and outside that policy.

Regulation

The only regulatory tools of planning that can be at all effective with regard to controlling timing and location of subdivision activity are zoning and subdivision regulation, and these do not attack the problem directly.

Zoning. - Zoning is the device which regulates the use of land in a community by zones or districts. Zoning, which ". . . has never been used effectively to guide the pace and location of new development,"¹⁵ could be an effective tool for controlling timing and location of subdivisions by zoning large areas not ready for residential development

¹⁴Green, supra note 8, at 40.

¹⁵DeLafoos, supra note 13, at 25.

for agricultural or "open space" or for industrial use.¹⁶ This implies a requirement that residences be prohibited in such zones. Later, when the need for residential development in these areas was apparent and when services could be extended, the areas could be rezoned for residential development. Very large minimum lot sizes - say, five acres - could be imposed through the zoning ordinance. Later, higher density development could be allowed by a zoning change. Zoning could also be utilized to establish a sequence of districts in which subdivisions would be permitted. The necessary device here would be a system for granting building permits on the basis of these priority districts. Another approach might be to devise, on the basis of the comprehensive plan, a ratio of building permits to be used in any one year for the various kinds of uses.¹⁷

Subdivision regulation. - Subdivision regulations have had some effect on location already by requiring subdividers to assume the cost of developing their subdivisions. Requiring street and other improvements, particularly water and sewer facilities, has encouraged the subdivider to develop land close to the city, so that he will not have to pay for lengthy extensions of water and sewer mains to his development. This has tended to deter development of scattered subdivisions. Putting all the costs of such facilities on the subdivider in areas outside the city will have a very salubrious effect on overall development, as would a policy refusing entirely to service areas outside the city limits, or to do so only on payment of very high charges. A further possibility to

¹⁶Cutler, "Legal and Illegal Methods for Controlling Community Growth in the Urban Fringe" 44 Wisc. L. R. 370, 377 (1961).

¹⁷Green, supra note 8, at 39.

be explored is a system scheduling the subdivision of a determined number of lots during a particular time period. This would be similar to one of the proposals discussed in the section above on zoning.¹⁸

It will be observed that a combination of all these approaches - ownership, encouragement, and regulation - will be necessary under the present status of law to achieve maximum results.

It is particularly necessary that zoning and subdivision regulation be used in conjunction. Land not suited for subdivision should be zoned for other uses, as already mentioned. Later, the zoning could be changed as development of these areas becomes desirable. This would have to be based on a "master" plan or comprehensive plan for community development. Unfortunately, many of our cities do not really have a comprehensive plan, though they usually have some segments of one. In this area we have been remiss in our preparation for the problems now facing us and those to come.

Here again we come back to an old bugaboo, the extent of the city's zoning and subdivision jurisdiction. Much of what has been discussed would not be possible because developers could evade the aims of the community by going past the line of municipal jurisdiction to subdivide, relying on wells and septic tanks unless there were regulations to prohibit such. Unfortunately, there usually are not such regulations.

Prevention of Subdivision

Some of the land around our cities will not be ready for subdivision for residential purposes until time has passed and changes have

¹⁸Green, supra note 8, at 40.

occurred. Implicit in a discussion of timing and location controls is another idea - that some land is of such a character as to be unsuited for residential development at all. Up to this point in time municipalities have really done little to deter or delay platting of land that is suited for residential development but not yet needed. They have done a little better about preventing the subdivision of land that is not suited for residential use because of its character.

Flood plains

Flood plain control is a public regulation of the use of private land. Such control is usually provided by part of the zoning ordinance and/or subdivision regulations, but it can as easily be provided for in a separate document. Control through zoning and subdivision regulations consists of the establishment of zones or districts within which the private use of land is restricted to uses that are essentially of the "open land" variety, and provision that no new construction will be allowed in the floodway. Construction in the flood fringe areas is possible, but highly restricted.

It must be recognized that the forces of nature are responsible for the creation of areas that should never be used for human occupancy, and only for very limited purposes, if at all -- uses such as agricultural, parking, airports, water-oriented uses - like marinas, recreation, and some types of industrial activity, such as rock quarrying and open storage.¹⁹ If areas such as flood plains are developed and occupied the problems are only increased, yet we continue to encroach on these flood

¹⁹Flood waters will not endanger life and very little property if the flood plains are restricted to such uses.

plains with our development. The extent and effect of this encroachment is illustrated by the following statement:

In 1900, flood damage in the United States was about \$100 million; in 1960, it was about \$300 million. The increase is not due to a greater number of floods but to increased encroachment on flood plains.²⁰

Still we encroach on the flood plains, and then demand flood control programs, larger storm sewers, and elevated highway facilities to alleviate the situation, all at taxpayers expense. The cost of such is not small. "It has been estimated that for every six dollars spent by the federal government on flood protection, five dollars is spent by the general public expanding into the flood plains."²¹ Why does this encroachment continue?

This expansion results from (1) ignorance that the area is subject to flooding, (2) failure of developers to warn prospective buyers of land that may be flooded, (3) the tendency of people to prefer living and working on level bottom lands, and (4) the higher values of flood plains and hence the source of higher revenues.²²

Fortunately many localities have begun to recognize the desirability of preventing residential subdivision in areas subject to periodic inundation,²³ and have amended their zoning and subdivision ordinances to include provisions preventing subdivision of such areas.

There can be little doubt about the validity of such provisions. Assuming that state legislation enables the municipality to regulate flood plains, the only question is whether the regulation is constitutional,

²⁰Love, "Floods," Planning 1963 52 (1964).

²¹Ibid.

²²Ibid.

²³This recognition often comes immediately following a disastrous flood. Even that is not always sufficient, however.

and does not violate the concepts of due process and equal protection.²⁴ Courts in California, Connecticut, Georgia, Missouri, New Hampshire, New York, South Carolina and West Virginia have held that the regulation of land use in floodable areas is a proper exercise of the police power.²⁵ The validity of this control is founded in an old established principle: the protection and promotion of public interests sanctions the use of the police power limiting individual activities by application of regulatory laws.²⁶

Cooter sums up quite well the legality of flood plain regulations:

When land use regulations which local governments have authority to promulgate are calculated to benefit the community, through establishing adjustment to flood conditions as part of an over-all community plan, there clearly would be no doubt as to their general legal soundness. Of course, the legality of their singular effects will depend on the factual consequences of their application. This is, however, the case respecting all regulations promulgated under the police power.²⁷

Though there has been one case that invalidated flood plain zoning, municipalities with statutory authority and carefully drawn local ordinances may proceed to regulate flood plain development with little to fear.

²⁴Dunham, "Flood Control Via the Police Power," 107 Penn. L. R. 1098, 117-1129 (1959).

²⁵McCarthy v. City of Manhattan Beach, 264 P.2d 932 (Cal. 1953); Vartelas v. Water Resources Commission, 153 A.2d 822 (Conn. 1959); City of Americus v. Mitchell, 5 S.E. 201 (Ga. 1888); State v. Metropolitan St. Louis Sewer District, 275 S.W. 2d 225 (Mo. 1955); American Land Co. v. City of Keene, 41 F.2d 484 (1st Cir. N. H. 1930); City of Rochester v. Simon, 31 N.E. 871 (N.Y. 1892); City Council v. Werner, 17 S.E. 22 (S.C. 1893); City of Welch v. Mitchell, 121 S.E. 165 (W. Va. 1924).

²⁶Chicago B. & O. Ry. v. Drainage Comm., 200 U.S. 561, 592 (1906).

²⁷Cooter, "To Stay Out of Floods," 50 National Civic Review 534, 539 (1961).

²⁸Hager v. Louisville & Jefferson County Planning & Zoning Commission, 261 S.W. 2d 619 (Ky. 1953).

Hillsides

The subdivision of hilly areas is a growing problem.²⁹ Rough terrain alone does not present much of a danger to life and property; it only makes subdivision difficult and costly, for perfectly obvious reasons. The problem is presented in situations where the possibility - or probability - of slides is present.

Examples of occurrences of this kind are as common as news stories about floods and flood damage. For example, in 1959 near Los Angeles, land slides wrecked two fifty thousand dollar homes. The cause was suspected to be water seepage, compounded by grading for home sites lower down the hill. In 1956, at Portuguese Bend, near San Pedro, in the Los Angeles area, 145 homes were gradually destroyed by sliding earth. The result of this: over \$20 million in law suits. Then in Pittsburgh, in 1959, eleven homeowners sued the builders and won \$150,000 because their back yards slid away.³⁰

Another example, this one in Washington:

Slippage has severely damaged or completely destroyed many homes. A number of homes valued at \$30,000 were damaged severely, several destroyed, in nearby Washington, D. C., recently as a result of hillside slippage.³¹

Our last example shows the consequences as they may effect individuals:

²⁹American Society of Planning Officials, Hillside Development
I (Public Advisory Service Report No. 126 1959).

³⁰Id. at 3.

³¹KI Ingeblat, "Bases for Urban Development," Planning 1963
44 (1964).

Every month Mr. and Mrs. Robert Scott of Alexandria, Va., make another payment on the mortgage of a 30-thousand dollar house near Washington's Mt. Vernon. The payments are to continue for 15 years. . . . [But] the house is not their home In April, 1960, the hillside above, its marine clay soil saturated with water, began to slip toward the Scott's house. . . . On February 1, 1961, heavy snow saturated the hill again. It slipped and. . . the Scott's house was leveled. . . . A pile of rubble at 419 Bluebill Lane mocks the Scott's monthly payments.³²

It can be seen from these examples that though some areas in California are known to be particularly vulnerable in this matter, sliding or slippage can occur anywhere, under a certain set of soil conditions.

David Craig has indicated that this is not always a problem. "Like flood plain zoning, the slope zoning we use in the hills of western Pennsylvania severely limits construction on land that hardly anybody wants to build on anyway."³³ Perhaps the people in western Pennsylvania do not wish to build on the slopes there, but people elsewhere are developing hilly terrain for residential purposes without much regard for the stability of the slopes. "Planners should be particularly aware of these unstable slopes since the popularity of hillside sites has increased considerably in recent years."³⁴

Unstable soil areas, subject to slippage, can be determined from soil maps, and can be avoided as construction sites. Slope maps should also be utilized in order to determine areas that should not be developed for residential purposes. Areas that are developable for a

³²Linsley, "Planning for Conservation in the Suburbs," A Place to Live 391 (1963).

³³Craig, "Head In the Sand About the Value of Land," Zoning Digest 4 (Vol. 15, No. 1, January 1963).

³⁴Klingebiel, supra note 31, at 44.

particular kind of residential use, as determined by soil maps and slope maps, should be subject to a specific set of regulations. In several areas of the country where rough terrain is a factor to contend with, the subdivision regulations have a section on hillside regulations. These regulations may make some modification of the subdivision ordinance, such as allowing street grades of over twelve per cent, for example, but will have some more rigid requirements, such as requiring larger minimum lot sizes.

Where the degree of slope is the only concern, special provisions in the subdivision regulations are adequate to promote sound development. Where slippage is a factor subdivision should be prohibited, notwithstanding the pressures to use the land for residential purposes. There is no more reason to build residences in such areas than in flood plains, and likely regulation under the police power would be upheld on the same reasoning.

Preventing Subdivisions that Would Burden Local Government

The desirability of preventing residential subdivision in flood plains and on slopes subject to slippage should be fairly obvious. No one likes to see houses flooded or carried away down the hill to end up as battered debris in a sea of mud. It is dangerous to people and property and certainly not a wise investment of funds.

It is also considered desirable in some instances to prevent subdivision for other reasons. What happens when local taxpayers are already overburdened in trying to pay for schools, streets, utility systems, and other public facilities and services? Can local authorities,

relying on the subdivision regulations, refuse to approve new subdivisions that would increase the burden on the facilities and on the taxpayers? Should they be able to refuse to approve new subdivisions on such grounds?

The quality as well as the cost of municipal facilities and services is of utmost importance. During periods of intensive land subdivision, when new residential units are being added at a much faster rate than municipal facilities can be expanded, the resulting overloads are likely to cause a decline in the quality of services.

Uncontrolled, this overtaxation of existing facilities may result in seriously substandard levels of water supply, sewage and waste disposal, public school education, and public recreation facilities.³⁵

In addition, if the rate of residential subdivision outstrips the pace of highway improvement, residential streets may be overcrowded.³⁶ What is really needed is a system that would prepare the various fringe areas for subdivision and allowing time for construction of the necessary facilities to serve them, and allowing time for each new development to be assimilated into the community.³⁷ Since the existence of such systems, if any, are not widespread, can the municipality, as an alternative method, simply refuse to approve plats for subdivision which would further tax already overburdened facilities? Or can the municipality rezone the area, if under its zoning jurisdiction, so as to preclude subdivision which would further burden it financially? The decisions

³⁵Walter, supra note 5, at 16.

³⁶As one example at random, this writer knows of one narrow street (24 feet wide) in a residential area that carries a volume of 10,000 cars per day and will until a loop or bypass to handle this through traffic is constructed. This is an obvious example of failure to program street improvement to even keep abreast of development.

³⁷As recommended earlier in this chapter.

recorded in this area are not favorable, but an investigation of those decisions to determine the judicial attitudes will be of value.

With one lone exception, the courts have taken a skeptical view of the idea that inadequacy of facilities or added tax burden is legitimate reason to prevent subdivision. This is the case whether the zoning ordinance or the subdivision regulations were the instrument utilized in the attempt to prevent development.

Prevention attempts through rezoning

In the first case in which rezoning was utilized as a means of preventing greater burdens on the municipality was in 1947, in the case of DeMott Homes at Salem, Inc. v. Margate City.³⁸ Here the town's zoning ordinance had been in effect for seventeen years, allowing duplex buildings in the zone in question. When the builder bought the land the town rezoned it to single family use, fearing that a greater tax burden would fall on the city if duplexes were built in this area. The town's reasons were thus set out by the court:

The proofs indicate that the commissioners of Margate City are fearful that the prosecutors project will cause the city to become overpopulated in that area and increased economic burdens will fall upon the municipality to furnish essential school facilities, police and fire protection, etc. . . . and a resulting additional burden will fall upon other taxpayers of the municipality.³⁹

The amendment to the zoning ordinance was set aside by the court, which held that it did not bear a reasonable relationship to the powers conferred by the statute.

³⁸136 A.J.L. 330, 56 A.2d 423 (1947 Aff'd 47 A.2d 388 (1948).
³⁹56 A.2d 423, 426 (1947).

In Hendlin v. Fairmount Const. Co.,⁴⁰a 1950 case, the suit was over rezoning to allow a large number of garden apartments to be built. Area residents brought suit to invalidate the amendment, claiming that ". . . the greater influx of population would produce a shortage or inadequacy in public school facilities, water service and pressure, and fire-fighting facilities."⁴¹ The city commission acknowledged that its present facilities were inadequate to serve this large potential population increase, but promised that, as the apartments were occupied, ". . . all the municipal facilities. . . shown by actual experience to be additionally required because of the new buildings will be furnished by the City of Newark as and when needed."⁴² The court upheld the amendment, holding that "it is the duty of the City authorities to supply all such facilities as need for them appears."⁴³ Here, for the first time, is a clear articulation of the judicial attitude that it is the duty of the city to provide municipal services.

In the Hendlin case the municipality changed its zoning ordinance in order to acquire additional tax ratables, not to prevent a burden on municipal services. Similarly, in Putney v. Township of Abington,⁴⁴ in 1954, the municipality was attempting to obtain more revenue. In question was rezoning of a tract to allow a shopping center to be constructed; there was no question of additional burdens on the municipality. The court, though it upheld the rezoning, stated that a rezoning ". . .

⁴⁰8 N. J. Super. 310, 72 A.2d 541 (1950).

⁴¹72 A.2d 541, 547 (1950). See also Springfield Tp. v. Bensley, 19 N. J. Super. 147, 88 A.2d 271 (1952).

⁴²Id. at 550.

⁴³Id.

⁴⁴176 P. Super. 463, 108 A.2d 134 (1954).

designed solely, even principally, for the purpose of producing revenue cannot be justified as a valid exercise of the police power."⁴⁵ It appears from this decision, however, that if a rezoning is in keeping with the comprehensive plan it will not be overturned just because the municipality will benefit from increased revenue as a result of it.

In Albrecht Realty Co. v. Town of New Castle,⁴⁶ in 1957, the point in question was a scheme similar to some discussed earlier in this chapter. The Zoning Ordinance of New Castle was amended to put all land not served by necessary municipal services and such as streets, water, sewer, schools, police, recreation facilities, into a special residential district. In this district the building inspector could grant only the average number of permits per year granted in the 1950-1955 period, or, as an alternative, a number that the town board settled on. The plaintiff here bought land and allegedly improved it, but could not get building permits, so he brought suit. The court invalidated the amendment to the zoning ordinance on the grounds that there was nothing in the town law that gave the town the power to regulate its rate of growth.

Gruber v. Mayor and Tp. Comm. of Raritan Township⁴⁷ is a 1961 decision. Here plaintiff allegedly spent \$500,000 in development costs of five contiguous tracts he held, relying on plat approvals by the Township and on the residential zoning. The Township, concerned over its schools problem, subsequently rezoned all Gruber's tracts to light

⁴⁵Id. at 137.

⁴⁶167 N.Y.S. 2d 843 (1957).

⁴⁷39 N. J. L. 186 A.2d 489 (1962).

industrial use exclusively. The following facts from a lower court decision ⁴⁸upholding Township action show the township's plight:

Raritan Township covers an area of some five and one-half square miles and is located in Monmouth County. In 1950 the population of the township was 2,763. It was at that time essentially a rural community with scattered clusters of homes and a few commercial establishments. Much of the land area was vacant or devoted to agricultural uses. However, with the advent of the Garden State Parkway in 1954, which runs through Raritan Township, its character changed rapidly. By 1960 the population had exploded to 15,287, with the greatest increase occurring after 1958. This influx created a need for greatly expanded municipal services of all types, particularly school facilities. ⁴⁹

To document the dilemma, Mr. Herbert Smith, planning and zoning consultant for the Township, testified that at the time there were forty-nine classrooms in the Township with a maximum capacity of 1,845 pupils, but the total enrollment was 2,560 pupils, necessitating double sessions. He estimated that by 1964 or 1965 the enrollment from kindergarten through eighth grade would increase by another 2,600 pupils. To return to single sessions by that time would require 113 new classrooms--provided plaintiff Gruber's tracts remained zoned for industrial use. ⁵⁰

The Township's deficiency in school facilities and its financial difficulties were not enough to prevent the Superior Court's ruling that the Township was estopped from rezoning one of Gruber's tracts and sending the case back for retrial as to the other four. The problem here was that the local action gave rise to vested rights which could not be changed by zoning, according to the court.

⁴⁸68 N.J. Sup. 118, 172 A.2d 47 (1961).

⁴⁹172 A.2d 47, 50.

⁵⁰Ibid.

The court here did suggest, however, that zoning is a proper tool to restrict such burdens, but that caution would have to be exercised in connection with rezoning to achieve such purposes.

. . . the Township officials were seeking to advance the public welfare by alleviating the heavy tax burden and the harmful school congestion. So long as this was being done reasonably and in furtherance of a legitimate comprehensive plan for the zoning of the municipality, it fell within the terms of R.S. 40: 55-32, N.J.S. A.⁵¹

This is an encouraging statement by the court, pointing the way toward proper utilization of the zoning ordinance to control location and timing of subdivision of land.

There is one further decision, Christine Building Co. v. City of Troy,⁵² but it does not seem to be particularly significant because of the factual situation involved. The Troy zoning ordinance required one-half acre lots in the area in question. The plaintiff claimed that the ordinance limited the population density in proportion to the sewer capacity. The city countered that this had a direct relationship to public health factors. The City had a master plan and contended that allowing 8,500 square foot lots, as requested, would not be consistent with the plan. The ordinance fell. There were 8,500 square foot lots in the city, with septic tanks even, and this fact seemed to weigh heavily with the court, which held that the ordinance as applied to the property in question was arbitrary and capricious.⁵³

The lone case in which the use of zoning to control timing and

⁵¹ 186 A.2d 489, 493 (1962).

⁵² 367 Mich. 508, 116 N.W. 2d 816 (1962).

⁵³ 116 N.W. 2d 816, 821.

location of subdivision has been upheld in Josephs v. Town of Charlestown,⁵⁴ a 1960 decision. Here the town's zoning ordinance set minimum lot sizes of 40,000 square feet in the R-1 District. Special permits could be granted by the Board of Appeals if existing facilities were adequate to provide for the needs of future residents in the proposed subdivision. The plaintiff applied for a special permit, and was refused on grounds that it would crowd schools unduly to build on 22,500 square foot lots.

Josephs, then, is a case in which zoning of large lots worked as a method to limit development. This, it must be remembered, was a case in which the zoning ordinance provided for this procedure; it was not a quick rezoning requiring large lot sizes in an attempt to head off development in a certain area. This is the crucial point in this matter.

Attempts utilizing subdivision regulations

There are no cases in which use of the subdivision regulations to control timing or location has been upheld. Indeed, there has not even been any suggestion that this is possible; without specific statutory authorization it is doomed. Some cities have tried in the past, and others doubtless will try in the future, however, because of the added burdens that may be imposed on the municipality without some control over timing and location of subdivisions.

In Beach v. Planning and Zoning Commission,⁵⁵ the Town of Milford, a rapidly growing area, denied subdivision plat approval for a 145 lot

⁵⁴24 Misc. 2d 366, 198 N.Y.S. 2d 695 (1960).

⁵⁵141 Conn. 79, 103 A.2d 814 (1954).

subdivision on the grounds that (1) the land was adjacent to a new development that would contain seventy-nine homes; (2) the Town Council had stated that the financial circumstances of the Town were such that no new schools could be built in the area for some time; (3) the additional police and fire protection which would be needed in the area could not be provided, due to the financial situation; and (4) the school superintendent's report showed that there was a new school in the area, but it would be inadequate to provide for the children already in the area soon after it opened.⁵⁶ The Town's subdivision ordinance did not expressly authorize rejection of a subdivision plat on grounds that schools would be overcrowded and town finances further imperilled. Neither did the state enabling statute provide for rejection or disapproval on such grounds.

The Connecticut Supreme Court of Errors pointed out that the municipal planning commission had no authority to refuse on such grounds:

The defendant contends that a municipal planning commission is a legislative body and as such has power to legislate to the effect that no subdivision will be allowed which will cause an unbearable financial burden to the town. This contention is unsound for several reasons. In the first place, it is clear from the statute that in exercising its function of approving or disapproving any particular subdivision plan, as distinguished from its function of adopting regulations, a municipal planning commission is acting in an administrative rather than legislative capacity.

In the second place, in the performance of its legislative duties in adopting regulations pertaining to subdivision, such a commission is restricted by the statute both as to the method of procedure and as to the subject matter which the regulations may cover.

⁵⁶103 A.2d 814, 816 (1954).

. . . there is nothing in 2858 which authorizes regulations prohibiting the subdivision of land because it would place additional financial burdens upon the town.⁵⁷

The court concluded that since there was no regulation allowing prohibition of a subdivision for the reasons stated, its refusal was ultra vires and illegal.⁵⁸

In Daley Construction Co. v. Planning Board of Randolph,⁵⁹ the plat was filed with the planning board, it complied with the regulations, but it was disapproved. The plan was approved by the town highway surveyor, the town board of health, and the town water commissioners, who had approved the layout. The water commissioners, however, ". . . had determined that there was an acute shortage of water and lack of water pressure . . . and that a fire hazard had been created."⁶⁰ The planning board was so notified after the plat in question was filed, and thus they disapproved it. The court cited the statute which said that the

. . . powers of a planning board shall be exercised with due regard. . . for securing safety in the case of fire, flood, panic and other emergencies. . . and adequate provision for water, sewerage, drainage and other requirements where necessary in a subdivision.⁶¹

The court clarified this statement of purpose, however, as follows:

It is not made sufficiently clear that the application of the law is limited to regulating the design and construction of ways in subdivisions, and some well-intentioned but overzealous planning boards have attempted to use their power (of plat approval) to enforce conditions doubtless intended for the good of the public but not relating to the design and construction of ways within subdivisions.⁶²

⁵⁷Id. at 817.

⁵⁸Id. at 818.

⁵⁹163 N.E. 2d 27 (1959).

⁶⁰Id. at 28.

⁶¹Id. at 28-29.

⁶²Id. at 29.

The court held that denial of plat approval on grounds that the subdivision would accentuate the town water shortage was not valid. The clear implication is that the validity of conditions intended for the good of the public could be upheld under a proper statutory enactment.

Midtown Properties, Inc. v. Township of Madison⁶³ is a case involving some 1,475 acres or 5,800 lots in the township. The case came into court because of the planning board's refusal to approve a plat of the first 129 lots of the tract. The lots did not meet the minimum size requirements, and after several unsuccessful tries for approval, the company entered into a contract with the township. Acting on this contract, approved by a consent judgment, the company spent \$200,000 for redesign of its layout, and again sought approval. Again it was refused, and this time the planning board acted on grounds that the consent judgment and the contract were illegal. The court explained the contents of the contract:

A mere reading of the contract will disclose the illegality of what the parties proposed to do. The plaintiff, among other things, agreed to pay certain moneys to erect a certain number of schoolrooms for the Board of Education; it agreed not to erect more than 1,350 homes in any one year; to devote to the township two locations, of two acres each, for the erection of fire houses, police stations and first aid squads. ⁶⁴

The court held the contract illegal and void as ". . . an attempt to do by contract what can only be done by following statutory procedure." ⁶⁵

⁶³68 N.J. Super. 197, 172 A.2d 40 (1961).

⁶⁴172 A.2d 40, 44 (1961).

⁶⁵Id. at 45.

It stated that the municipality had no right to impose such conditions because they were not authorized in the statutes.

Justice Halpern then stated that taxation is the only method for financing school costs.

It is the duty of the municipality to educate our citizenry; to build schools, and equip and maintain them for such purposes. The cost for public education, in a democratic society, must be borne by the public and the funds to be used for such purposes must be raised by public taxation.⁶⁶

This writer submits that it is no less the duty of the municipality to control its development so that it is not unduly and unnecessarily burdened financially.

These cases indicate some of the problems of uncontrolled urban growth that plague our cities, towns, boroughs, villages, and satellite cities. They also illustrate just how far desperate local officials will go in attempting to alleviate their problems and prevent new ones.

Additional Factors in Timing and Location Control

There are two factors in addition to those already covered that must be considered in any discussion of control over timing and location of new residential subdivisions. These two factors are credit policies and tax policies.

Credit policies

The extension of credit by either private or public lending

⁶⁶Id. at 47.

agencies is outside the domain of subdivision regulations themselves. Any progress made in this area will have to be made outside the framework of the established control regulations. There are, however, some factors in this area that tend toward persuasion, if not strict control, over the timing and location of new subdivisions. First, private money is available, but such agencies favor the larger and established subdividers, who at least may tend to use some judgement in the location of their developments. It should be noted at this point that the better developers are cognizant of the advantages of having public facilities in or near to their subdivisions. A new school, or a good school that is not crowded, an adequate water supply and sewerage system, and attractive parks and play areas are good selling points. Their recognition of this fact may act to influence the timing of their developments, as well as location. Still, the private lending agencies have little influence here, so far as can be seen. The second factor is the reliance of so many developers upon public lending agencies. Easy terms are the keynote of the new housing market, and to provide low down payment and low closing costs - if any - the subdivider who deals primarily in houses, not lots,⁶⁷ must have his subdivisions approved by VA and FHA so that their loans will be available, in addition to conventional financing.

This approval by VA and FHA, particularly, gives those agencies a lever to apply if they would do so. The FHA's intention to consider timing and location factors in its review is shown by this quotation from one of its early publications:

⁶⁷Most subdividers today are in the housing market. See Chapter III, pp. 32-33, supra.

. . . (1) that the development of urban land should create neighborhoods of definite character; (2) that such neighborhoods must be in proper relationship to a reasonable consideration of the manner and extent of the expansion of the community as a whole; (3) that such neighborhoods should be designed to meet a demand for a definite type of housing accommodation within the community.⁶⁸

This writer's conclusion is that, however laudable its initial aims, FHA's principal success has been in the area of the internal aspects of new subdivisions. It's failure to gauge demand accurately for residential units, as it intended to do, according to (3) above, is shown by the often very large number of FHA insured houses that have been abandoned, then repossessed, and are still vacant in several major cities across the United States.⁶⁹

The objective of FHA was worthy, and perhaps the agency could fix its credit policies to encourage or discourage subdivision, in accordance with a comprehensive local plan for development. Doubtless it would do so if local officials as a group were vigorous enough in their demands.

It may even be possible to persuade local private lending agencies to grant or deny loans for development in given areas only in accordance with the systematic plan for development. This compliance would require great understanding, a sense of civic responsibility -- and considerable pressure, probably.

⁶⁸FHA, "Subdivision Standards for the Insurance of Mortgages on Properties Located in Undeveloped Subdivisions," I (Circ. No. 5, 1937).

⁶⁹A portion of this is due to extending credit unwisely; but this does not account for the subdivisions that are largely vacant. See Chapter IV, pp.73-83, supra.

Tax policies

Real estate tax policies ought to be coordinated with planning goals in our local communities.⁷⁰ If this were done the effect on development timing and location would be very significant. The tax power of local governments could be a very forceful tool in shaping development. The situation now, however, is that most local government tax policies work to encourage slums, sprawl, and speculation. The reason ". . . is that today's tax policies. . . harness the profit motive backwards when it comes to land use, land development, and redevelopment."⁷¹ These policies make slums the most profitable housing investment; make under-use and misuse of land more profitable than optimum use; and give speculation on vacant land such preferential treatment that it is ". . . set apart from the market action of supply and demand."⁷²

Stating that ours is a tax-activated, tax-directed, tax-dominated economy, Perry Prentice points out two ways in which our system works backward.

First, it taxes the value of unimproved land so lightly that owners are under no pressure to sell or to develop and can wait until they are offered many times what the land is worth before selling. Secondly, the system as it generally operates taxes improvements so

⁷⁰Pickard, "Adapting the Property Tax to Social and Economic Change," *Urban Land*, January, 1965, p. 3.

⁷¹Prentice, "Taxes and the Death of Cities" Architectural Forum November, 1965, p. 56.

⁷²Ibid.

heavily that it makes slums the most profitable real estate investment. This operates against the public interest. As the Mayor's Special Committee on Housing in New York said in 1960 of the situation there:

The \$2 billion public housing program has not made any appreciable dent in the number of slum dwellings No amount of code enforcement . . . will be able to keeppppace with slum formation until and unless the profit is taken out of slums by taxation. ⁷³

Slums, like sprawl and speculation, are a major concern of local officials and planners, though perhaps less directly related to the general topic of subdivision regulations.

Sprawl is caused in part by under-assessment of land which allows speculators to hold desirable land off the market, thus forcing premature subdivision of tracts farther out. This "leap frogging" in turn further increases the value of vacant land held close in. Yet our tax assessment usually takes no notice of this.

One could well ask why our tax policies operate to give such preferential treatment to speculators, particularly in view of the fact that

. . . the value of unimproved suburban land and under-improved urban land derives 100 per cent, and perhaps more than 100 per cent, from money the community has had to invest in roads, streets, sewers, schools, water supplies, fire protection, police protection and other community facilities without which that land would be neither accessible nor livable. ⁷⁴

Prentice asks whether, in view of the facts just stated, heavy taxation of community-created location value of land would be wrong. Further, since the magnitude of the speculator's profits is, as Winston Churchill

⁷³Id. at 57 (emphasis added).

⁷⁴Id.

said, "apt to vary in direct proportion to the disservice the speculator has done to the community,"⁷⁵ Is it more important to keep America safe from land speculation than it is to make it a better place to live? Prentice answers emphatically in the negative, and this writer concurs. Something is going to have to happen; the property tax must be adapted to social and economic change to serve the public interest.

Agricultural land or agricultural use regularly enters the picture when tax assessment policies are discussed. Urbanization is obviously taking land that has been used for farming. One consequence of this is that "substantial acreage" is removed from production⁷⁶ but this is not a factor to be concerned about unduly. Tax assessments are the cause of concern. It is said that high property tax assessments often compel farmers to abandon operations without immediate substitutions of a "better use."⁷⁷ If high taxes do force farmers to sell "They may become the prey of subdividers or interim speculators who buy the land for much less than it is worth for the new use."⁷⁸ Experience shows, however, that the farmers often hold their land and speculate on it, waiting for increased urbanization to take the price on up.

The problem of agricultural lands in transition in an urbanizing area is a most difficult one for the assessor. Higher assessments may force the farmers to sell. Higher assessments are not the general

⁷⁵ Ibid.

⁷⁶ Krausz & Pink, "Agricultural Assessing Practices," The County Officer 152 (Vol. 28, No. 4, April, 1963); Engelbert, ed. Urban Dispersal In Perspective 70 (1960).

⁷⁷ Ibid.

⁷⁸ Walker, "Land Use and Local Finance," Tax Policy 38 (1960).

rule, however. Most often the assessments remain low, permitting the landowners to pay low taxes on their land for a period of time, then sell it for large profit.⁷⁹

There are two basic approaches to the assessment problem as it relates to agricultural lands. One approach is preferential assessment, which would assess land zoned for agricultural use at its agricultural use value. Statutes in four states⁸⁰ have attempted to establish this as policy. This legislation provides generally that in assessing farm land assessors take into consideration only the factors relevant to its present use and ignore the influence of market trends or potential use.⁸¹ It is doubtful that such legislation will be upheld; the Maryland law failed because it lacked reasonableness and a showing of public purpose.⁸²

If it is deemed in the public interest to allow continuation of land in agricultural use in an urban area, the second approach, tax deferral, is the preferable method to preserve it. Tax deferral measures are designed to ease the burden on farmers but to recoup the taxes when the property is transferred to another use. To accomplish this the agricultural land is assessed at a higher non-agricultural use rate, but the tax is not paid until the use changes to a non-agricultural one.⁸³ This is obviously more equitable than tax abatement schemes, and is a good solution to situations where a farmer in an urban area really wants to continue farming.

⁷⁹ Ibid.

⁸⁰ Maryland, which passed such a law in 1956, California, in 1959; Florida, in 1959; and New Jersey, in 1960.

⁸¹ Walker, supra note 11, at 38.

⁸² Ibid.

⁸³ Krausz & Pink, supra note 9, at 155-156; Walker, supra note 11, at 40.

For open land that is not used for bona fide farm purposes, however, its assessments should increase in proportion to the increments in value it receives as a result of development around it and the investment of the community in the various public facilities.

Summary

Timing and location control has barely been attempted. To attempt such control there should be a comprehensive plan, with maps showing schools, parks, street and highway plans; there should be a sound policy for public and private utility extension, a policy which would both encourage and discourage growth according to the area involved; lending agencies' support for the same objectives should be sought; tax policies should promote the same end; and zoning and subdivision regulations should be used in conjunction to prevent subdivision in some areas, such as flood plains and dangerous slopes, and to control timing and location generally so as not to allow unguided subdivision to overburden the municipality. Finally, though, we must face the basic need for timing and location controls as such.

CHAPTER IX

SUMMARY AND CONCLUSIONS

In the previous chapters it has been shown that our nation, already predominantly urban, is in a great period of urbanization that will continue into the future. This great urban growth rate is the result of several factors, including the explosive population growth, the industrial revolution, technological innovation, specialization, mutual interdependence, improved transportation systems and convenience. There is definitely a high correlation between industrialization and urbanization, and while we are aware of our country's industrial and technological progress, most of us have not been sufficiently aware of its impact on our urban areas and their fringes.

Most of our urban areas were not ready for the growth they have experienced in recent years, and few are prepared for the great expansion that will occur over the next several decades. Many still have no systematic plans for their expansion. Instead of orderly community growth, urban areas have experienced haphazard growth, and the consequences have been dire indeed. Those who live in urban areas are going to be forced to cooperate with each other in order to preclude the unfortunate consequences of unplanned growth. The problems that have developed and are constantly developing in our urban society will require additional restrictions on the use and occupation of private lands in urban communities.

There will be more, not less, regulation because failure to regulate urban land use results in sprawl, scatteration, overbuilding, overcrowding, traffic congestion, encroachment of industrial and commercial uses in residential districts, and subsequent deterioration of certain residential sections and destruction of property values. Central business districts lack parking facilities, have empty stores, and present tax problems. Costly expressways are built, but they do not solve our transportation problems. Arterial ways lined with junk yards, honky-tonks, garish signs, cemeteries, drive-ins, shopping centers, and myriad service stations slow our movement and despoil our urban areas. The urban ugliness produced by all this confusion is increased periodically by the occasional fads such as "putt-putts," "batt-batts" and "jump-jumps" that emerge overnight and die as quickly, leaving behind their carcasses as ugly reminders of their short existence.

These conditions of disorder and ugliness are proof of the need for planning, to say nothing of their cost in dollars to the overburdened taxpayer.

Planning is a means for systematically anticipating and achieving adjustment in the physical environment of a city consistent with social and economic trends. It is a continuing process for presenting a broad and comprehensive program for urban development and renewal. Planning considers physical, cultural, political and economic characteristics, and it attempts to harmonize these elements into a sound development plan for the whole urban area. In short, planning is essentially a process of understanding human needs and shaping future

public policy to serve those needs.

Planning is not new, but planning as we know it today, planning in a formal sense, is new. New, too, are the tools of plan implementation, which is the crux of planning. Plans are worthless if they are not implemented.

The tools of plan implementation are many and varied. Cities have general police powers, fiscal powers, the power of eminent domain, proprietary powers, and land use control powers.

A major land use control that has not yet been fully utilized is subdivision regulation. Subdivision regulation has probably the greatest potential of all the land use controls. Nothing is more fundamental in providing proper growth for the community.

Subdivision regulation is control by the local government over the platting and subdivision of raw land into building lots. The subdivision of land plays a permanent role in the development of a community because much of the form and character of the city or urban area is determined by the number, quality, and location of new subdivisions. Once land is cut up into streets, lots and blocks, and publicly recorded, the pattern is hard to change, and generations of people who occupy the land will be influenced by its character.

Most cities and urban or urbanizing areas do not have adequate subdivision regulations. They pay a high price for their failure to establish such control. The price is high in lack of amenities; it is high in tax dollars.

We are surrounded by the problems of unplanned growth. Many of the harmful consequences could have been prevented by establishment and

enforcement of subdivision regulations. But cities have been lax, and the result has been low-grade subdivisions, premature and excessive subdivision, partial development of subdivisions, and scattered subdivisions.

Low-grade subdivisions are developments in which houses are too small, or too close together, or built of substandard materials, or on lots with few physical improvements or no improvements at all, or are in areas such as steep hillsides or poorly drained flatlands that are not suitable for residential development.

Premature and excessive subdivision of land has provided us with more vacant lots and vacant houses than our population can use, even with its rapid growth rate. This is the product of speculation. Premature and excessive subdivision confuses and upsets land values, demoralizes the market for homes and home sites, takes land out of productive use, adversely affects surrounding land, retards or prevents development when land is ready for it, and increases the tax burden on the community. The waste of public and private resources as a consequence of premature and excessive subdivision is shameful.

Partial development is often a consequence of a premature subdivision. Only rarely do premature subdivisions ever build up completely. They usually remain largely vacant. Sometimes they will have limited improvements, but they are seldom equipped with sufficient utilities. Often overgrown by weeds and scrub growth, with faded street signs and cracked and broken pavement or potted dirt roads, they stand idle while population and development moves off in another direction, by-passing them.

Scattered subdivisions are a concomitant of premature or excessive development. Scattered subdivisions seldom, if ever, pay their own way; instead, they impose a financial burden on other land and taxpayers to make up the difference between costs and revenues. Costs to the community for developments of this kind usually far exceed revenues, largely because of the distance factor and the resulting high cost of providing municipal utilities and services to the distant and scattered developments.

Solving the problems created by these undesirable developments is difficult and costly. Prevention of the problems would be far more desirable. The direct approach, which might allow for public ownership of land or which might require prospective subdividers to obtain a certificate of convenience and necessity before land could be developed, is not likely to be accepted in America in the near future. We must rely on refinement of the techniques and tools that we have, especially subdivision regulation.

Subdivision regulation, if properly utilized, could produce ideal subdivisions. There would be no building in areas unsuited for residential development; development of a plat would be based on topography for better utilization of the land area; premature, excessive, substandard subdivisions would not be tolerated; and adequate physical improvements would be required for all developments.

The ideal subdivision could be based on a neighborhood plan of development. It would have a good street system, utilities, schools, public buildings, a convenient shopping center, adequate space for all houses, and a pleasant residential environment.

We do not have many "ideal" subdivisions today, and a large part of the responsibility for that must rest on the subdividers. Subdividers want to make a profit. Many of them seem to want to make as large a profit as possible, regardless of the consequences. In the absence of subdivision regulations many subdividers engage in practices that recall the booming Twenties. The organized industry may appreciate in a general way the desirability of social control over land development, but their reaction when this control affects them directly does not always reflect this appreciation.

There are the "amateur" subdividers, people who may develop only one subdivision in their lives. These people may be incapable of fulfilling standards of good subdivision, but they, as well as the professional developers, must be regulated. The problem we are facing today is the kind of development occurring in our urban areas, not especially the kind of person who is responsible for it.

The use and efficacy of subdivision regulation have been hampered by our traditional attitudes toward land. Speculation in land is an American tradition of long standing. Speculation was doubtless a dominant factor in the development of our country, and many people have realized great financial rewards from such activity. We have not heard much, though, about the fortunes that suddenly vanished when the bubbles burst, nor have we heard much of the other malevolent consequences of speculation, the waste of resources and the increased governmental costs.

Despite the rampant growth and all the egregious consequences of speculation, there is still a widespread opposition to any type of

control that would hamper the activities of those who engage in speculative enterprises. It is very rare to encounter in this country any antipathy to new development. Just the opposite is usually the case. To many Americans development is progress, and nobody wants to hinder "progress," even if it takes the form of substandard, premature, excessive development and constitutes a drain on the public purse. To many it just seems un-American to restrict private ownership and use of land. However, unrestricted private ownership of land has encouraged an antisocial and uneconomic utilization of property in and around the typical American city.

Our prevailing attitude is one of general unconcern for the rate at which land is being consumed by new developments. This is born of our confidence that the supply is somehow unlimited. This attitude has been termed the "prairie psychology." Convinced that there was a never-ending supply of land, and devoted to the rights of private property and the free market, Americans have proceeded to develop their land, displaying a formidable antipathy to governmental controls over private development.

America has begun to mature, though, and as our cities deteriorate and people flee to the suburbs, our attitudes about land begin to change. We are coming to realize that the supply of land is not limitless, and that regulation of land use is increasingly necessary as our supply of land is depleted and as our urban masses crowd in on each other.

Regulation of land is not new. The fact is that government has exercised continuous and often elaborate control over many facets of land development since earliest colonial days.

Despite ancient antecedents, the land use controls that we have today cannot be traced to a preference for planning or for the planned community. The controls that we possess are not idealistic or utopian. Their origin was not in any theory of planning, but in the common law of nuisance, and they grew out of the individual's desire to protect his property from other property owners and users.

Zoning, one of the vital tools we have for regulating land use, is a product of the 1920's, the apex of free enterprise thought in America. It seems incredible that a technique for regulating private land use could be introduced and accepted at that time, but it was. To illustrate its acceptance, in 1919, only twenty cities in the United States had zoning ordinances, and in 1929, 973 cities had them. Zoning was accepted by the public because property owners wanted to be protected from each other, not because they were in sympathy with governmental regulation. Zoning seemed a good, sound, conservative device to protect property and property values.

The 1960's call for greater reliance on subdivision regulation, another land use control that can protect individual property and property owners, but one that will also protect taxpayers and the general public. Subdivision regulation must be so presented to the American people. The courts particularly must be convinced of the value and the validity of this tool of plan implementation.

Problems

The basic law for subdivision control is state law. Nearly all states have some kind of subdivision control legislation, but many of the laws are poorly drafted and inadequate. Some states have no statewide subdivision laws, and cities in those states must rely on whatever local legislation they can obtain for subdivision control purposes. Clear, adequate general enabling legislation is needed in all states in order to achieve maximum results from subdivision control.

Subdivision regulation is accomplished under the police power. The basic method is the power held by the local government to record subdivision plats that meet the requirements of state law and local ordinance. The courts over a period of years have come to accept the validity of subdivision regulation in general and the imposition of certain conditions in particular. Municipalities, operating under a statutory authorization, have been upheld in requiring subdividers to pay inspection fees and to dedicate streets, to grade and pave streets. Developers can be required to install sidewalks, curbs and gutters, street lights and street signs, too. They may also be required to provide drainage where necessary. Subdividers can be required to make other physical improvements in their developments as a condition to plat approval. They can be required to provide water and gas mains and electric lines, fire hydrants, and sanitary and storm sewers. Some cities even require developers to plant street trees.

The courts have accepted performance bonding as an alternative to providing the improvements prior to plat approval. This is important because some subdividers will not be financially able to immediately provide all the physical improvements required in their developments. It has been held that the local authority may waive the statutory requirements in respect to improvements where a performance bond is filed. Filing a performance bond allows the developer to put in some improvements, sell some houses and lots, then put in more improvements as he is able to do so. Performance bonding allows the subdivider to develop a parcel at a time, and relieves some of the financial pressure on him, yet the purchasers in a new subdivision are assured that they will receive the improvements the strength of which induced them to purchase houses or lots in the subdivision.

The courts have moved in recent years to accept the validity of requirements that force the subdividers to bear a greater share of the cost of installing physical improvements. The theory is that the subdivider may be required to assume those costs which are specifically attributable to his development and which would otherwise be cast upon the public. Many of the courts have realized that the subdivider merely acts as a broker; he installs and pays for the improvements initially, but he passes the cost on to the purchasers in his subdivision, and it is they who really bear the cost of the required improvements.

It is well established that "reasonable" requirements as a condition to plat approval will be upheld. Unfortunately, at this point the courts have not put some of the more recent requirements in this

category. They have been most reluctant to accept the legality of conditions precedent requiring land dedication or fees in lieu thereof for school or park sites. This is a need that is attracting more and more attention as our communities find their present facilities and finances overburdened by new developments. It is believed that action under an ordinance based on a carefully worded enabling statute containing adequate standards would likely be upheld.

State law provides for local control over subdivisions. It is at the local level that procedures for subdivision of land are carried out. Planning boards must be appointed, and the local ordinances must be carefully drawn in order to exercise all the powers over subdivision granted by the state legislation. The administration of subdivision regulations at the local level must be fair and impartial, enlightened and enthusiastic.

Local administration is the crux of subdivision control; it succeeds or fails at this point. Among the most significant administrative problems are officials who are reluctant to enforce the ordinance, the influence of politics, and evasion of the regulations by a variety of methods. Probably the two greatest problems are metes and bounds sales and the matter of extraterritorial jurisdiction. Metes and bounds sales, where legal, provide an easy means of evading the subdivision regulations. The problem with reference to extraterritorial jurisdiction is that it is too limited in most cities to allow subdivision regulations to be really effective. Too much development activity occurs outside the extraterritorial jurisdiction, and although such subdivisions affect the city, it is usually powerless to regulate them.

Aggressive annexation policies and more extensive extraterritorial limits are suggested remedies. Both these problems can be solved through appropriate legislation.

Adequate control over timing and location of subdivision has not yet been achieved. Progress has been made in regulations banning development in flood plains and on dangerous slopes, but courts have ruled unfavorably on attempts to prevent, through zoning amendments or the subdivision regulations, subdivisions that would burden municipal facilities, services, and/or finances. The best approach to timing and location control is (1) to utilize a comprehensive plan as the basis; (2) have a sound utility extension policy; (3) develop a capital improvements program that will guide growth into areas near major public facilities; and (4) zone land not ready for residential use as agricultural or industrial land until it should be developed, then rezone it. In conjunction with these, the legislatures should grant cities more extensive extraterritorial coverage, and the enabling statutes for subdivision regulation could be amended to allow timing and location factors to be considered valid reasons for plat refusal.

Planning is the new imperative of our time. No longer can we put up with helter-skelter growth. We have deferred too long to the developers, hoping that they would do what is right; too often they have not. Americans must realize that for health, safety, and economic reasons the community must regulate subdivision, in order to protect purchasers, mortgage lenders, the subdividers, and the community itself, and in order to obtain orderly growth for the community.

Subdivision regulation is a vitally necessary means of promoting orderly community development. It is designed primarily to protect and benefit the inhabitants of our towns and cities. The advantages of subdivision regulation are so numerous and emphatic that a community of any size at all is obligated to exercise control over the subdivision of land. In a highly urban society with rapid growth in the fringe areas, the public control of land development becomes an urgent concern, a necessity.

The courts have generally upheld the exercise of authority over subdivision. Inevitably, there has been conflict when the general principles of subdivision regulation are applied to specific ordinances, conditions, and factual situations. The purposes of subdivision regulations have been affirmed by the courts, as in this statement:

Its purpose is to preserve through a governmental agency a uniform and harmonious development of the growth of a village and to prevent the individual owner from laying out streets according to his own sweet will without official approval.¹

The authority of states and their municipalities to generally regulate subdivision was stated clearly in Mansfield & Swett v. West Orange:

The state possesses the inherent authority - it antedates the constitution - to resort, in the building and expansion of its community life, to such measure as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights -- either of person or property -- are incidents of the social order, considered negligible loss compared with the resultant advantages to the community as a whole. Planning confined to the common need is inherent in the authority to create the municipality itself; it is as old as government itself; it is of the very

¹Village of Lynbrook v. Cadoo, 252 N.Y. 308, 169 N.E. 394 (1929).

essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress.²

Surely one can appreciate the need for regulation of land subdivision, regulation that is a means of forestalling social costs and preventing one person's imposing hardships upon others or upon the community as a whole. Certainly, as the long evolution of the police power indicates, there are many areas wherein individuals profit by yielding certain of their rights to the authority of the community because the total returns to the community are thereby increased and each individual shares in an improved and greater community. The control of land subdivision which imposes certain restrictions on the conveyance of land in favor of the orderly development of the community is one such area.

The ownership of land is exclusive, but not absolute. This is an established principle, regardless of popular myths concerning absolute control. One may use his property to the exclusion of all others, but he must use it with respect for the rights of others and the limitations imposed by society to protect others' rights. The community retains rights and interest, which constantly change as the society and its needs change. Therefore, land use controls will change, and judicial attitudes in regard to land use control will change. Change is a fundamental law of society and of law itself.

Certain changes in land use controls and in subdivision regulation are necessary. As Dennis O'Harrow has stated, "A basic weakness of present land use control techniques is an inadequacy to handle development on the modern scale."³ Zoning and subdivision regulations both were

²120 N.J.L. 145, 198 A. 225, 229 (1938).

³HHFA, Urban Expansion 138 (1963).

Initially conceived to deal with individual lots, and there has been very little real change since "the days before tract housing, shopping centers, and industrial parks." ⁴ Despite a mountain degree of concern - in some quarters - about the way in which urban patterns have been developing in an uncontrolled fashion, we have not made enough progress, according to Belser.

The ironical aspect is that nothing really constructive has been done about making it possible to control development in such a manner as to produce a meaningful pattern of metropolitan development.⁵

Delafons elaborates on the problem of inadequate controls:

Such objectives as the long term programming of private development, reservation of land for future public use, prevention of piecemeal redevelopment in areas which will later be subject to comprehensive redevelopment, and protection of undeveloped land for its agricultural, recreational or landscape value, are generally beyond the scope of present controls and are only rarely admitted as proper or necessary objectives of public policy.⁶

Deafons concludes that this is largely because the principal objective of land use controls in America is the traditional protecting of private property interests.

Chapin emphasizes the lack of adequate land use controls:

Techniques in use in urban areas today are a curious patchwork of devices, many an outgrowth of special-purpose efforts to meet particular problems and needs of their time, and many bearing the mark of the fragmented governmental situation that have prevailed in the period the techniques have evolved.⁷

⁴Ibid.

⁵Engelbert, ed. The Nature and Control of Urban Dispersal 2 (1960).

⁶Delafons, Land Use Controls in the United States 99 (1962).

⁷Engelbert, supra note 5, at 110.

If we are to attain orderly community development we must have adequate methods, including improved and enlarged scope for subdivision regulation. The courts have been slow to accept expansions of subdivision control in the past; they must be more aware of the social and economic demands of a dynamic society that make increased regulation under the community's police power necessary.

Laggard Law

Planning has been critized for having

. . . fallen behind because it has not sufficiently taken into consideration the vast economic and social changes which are taking place and which are affecting the basic character and structure of urban communities.⁸

The criticism misses its mark; it is not altogether planning which has failed to meet the increased demands of a dynamic social and economic change in our society, but the law, which has so often invalidated the attempts of planners to cope with new situations and new demands.

Any number of new planning techniques are rendered valueless if invalidated by the courts, which obviously

. . . play a very important role in shaping the general character and scope of land use control by their function in reviewing the constitutionality of new techniques and application of established methods to new circumstances.⁹

Courts do change their opinion though, usually after an indecently long interval has passed, and if the planners are diligent in devising and

⁸Ibid.

⁹Delafons, supra note 6, at 92.

utilizing new techniques and if the public understanding increases, the chances are that these techniques will be accepted by the judiciary eventually.

Delafons claims that the courts have generally supported land use controls. "From the early cases which established the validity of the zoning device, the courts have, despite some reverses from time to time, supported the gradual extension of land use controls."¹⁰ A thorough review of the case law leads this writer to conclude that "the reverses from time to time" have been of such magnitude as to depict a generally unfavorable judicial attitude. Cases such as Kass v. Lewin,¹¹ Pioneer Savings & Trust Co. v. Village of Mt. Prospect¹² and Miller v. Beaver Falls¹³ have had an egregious impact on subdivision law generally, and have tended to overshadow decisions that uphold the various requirements. In the course of the evolution that has produced judicial acceptance of a fairly long list of requirements the courts have changed their minds and have overruled earlier opinions. But they do so reluctantly and slowly. The law is characterized by deliberation and this deliberation has had an unfortunate effect on land use control measures, but the lag between law and social necessity has perhaps never been so pronounced - or so crucial - as it is now.

Unquestionably the concern of planners, public officials, and the public over the quality of our urban environment will ultimately have a great impact on the law. The concern will increasingly be

¹⁰ Ibid.

¹¹ 104 So. 2d 577 (1958).

¹² 22 Ill. 2d 375, 176 N.E. 2d 799 (1961).

¹³ 368 Pa. 189, 82 A.2d 34 (1951).

articulated, and, because of the rapid changes in our society and the demands occasioned by population growth, urbanization, and sprawl, the law will become more responsible to social needs.

The search for quality development leads to two major conclusions. First, Dukeminier states that in the search for quality,

... legal institutions for dealing with land planning problems, will undergo a remarkable change. Much of present legal doctrine will become inherently irrelevant. Law has too often dealt of land planning problems as problems of one land owner abstracted from the real world. In the future we shall have to deal with all of reality as a whole and organize legal institutions for this purpose.¹⁴

Dukeminier suggests the development of a management team system for land allocation, development, redevelopment, and finance. Such a team would include government and business professionals: public planners, private planners, investors, systems analysts, developers, architects, economists, tax experts, traffic engineers, and lawyers.¹⁵

Just as fiscal policy and economic growth are now guided by a team of experts, so in the future experts will probably run the business of developing and financing the metamorphosis of raw or slum land into gardens.¹⁶

Dukeminier believes that this new system will be largely extrajudicial; the courts may offer "a word of wisdom" occasionally, but they will not actively intrude on the management process. Innovation along the lines suggested in this volume would assist in bringing such a "team" together for a truly comprehensive development approach.

¹⁴Dukeminier, "Foreword: The Coming Search for Quality," 12 UCLA L. B. 707, 712 (1965).

¹⁵Ibid.

¹⁶Ibid.

The second major conclusion is that new concepts of land ownership must develop. The law of real property had its origins ten centuries ago. The concept of ownership has undergone change in the intervening time, and doubtless more changes will occur. If we are to progress we must develop concepts of urban land ownership that are different from those we now have.

Our present concept of ownership of urban land includes the right of the owner to determine to what uses land will be put and when, subject to quantitative limitations imposed by public authorities. Permitting the owner to determine use may have been sound policy in Old England, when the manor stayed in the family for generations and the company built houses for its workmen. It may even have been sound policy in pretechnological America. But this policy does not take into account important factors in modern civilization, such as increasing population, automobility and urban sprawl, and the speed of technological change.¹⁷

Permitting the owner to fix land use in a society dominated by mobility means that land use is determined by considerations of the moment. More and more owners of land view their relationship to the land less and less permanently. Land is a place for a business, which may easily move and, therefore, write off its depreciation as quickly as possible. The land developer too, is mobile; he is a temporary owner who gets in and gets out quickly. Residents are exceptionally mobile; one out of every five families in the United States moves during the year. Families do not often retain ownership of a house or land over many generations: "permanent" parents will likely have mobile children, and ownership of the family home will change. It can be seen that "home," in the sense of permanent attachment to a place, hardly exists in this mobile society.¹⁸

¹⁷Id. at 714.

¹⁸Id. at 716.

The highly mobile professional or technical people "buy" homes wherever they live, of course, but they do not view it as a purchase with a mortgage they intend to pay off. They are really renting, viewing the house as a temporary commitment. They buy houses because of tax advantages available for writing off mortgage interest and taxes. When they move they sell their house, and go through the same process elsewhere for a year or two.

In spite of the facts we continue to think of urban land ownership as if it were rural land in a land-dominated, non-industrialized, non-technological society. It is obvious that our concepts are out of gear with our times. A permanent commitment to place in a technological society such as ours is contradictory to the nature of the system.

It is believed that the pretechnological concept of land ownership is on the wane. Land is still thought of as a commodity of the free market, but some segments of the public are beginning to think of it as a basic community resource.²⁰ As growth continues and problems are compounded land use will increasingly be seen as a community resource; legal institutions must realize and accept this change.

Dukeminier feels that the concept of urban land ownership will not change through a process of logical reanalysis, but by unconscious redefinition of meanings.²⁰ The emerging attitude of the mobile urbanite toward his "house," not "home," is an example of how this will occur. Neither will emerging concepts of ownership displace the old. We shall probably have a mixture of ownership ideas to meet the needs of various

¹⁹Walker, "Land Use and Local Finance," Tax Policy 15 (1960).

²⁰Dukeminier, supra note 7, at 716.

urban situations and the continuing rural sections. We may go so far as to view some urban land as an investment, like General Motors stock. This land, like General Motors, would be run by professionals, with little intrusion by stockholders. It would be bought for returns on investment, not for purposes of control. The increasing cost of desirable land in urban areas makes this idea a distinct possibility. Planners might act as "trustees" for the public, overseeing use and development of all urban lands.

Whatever else the shape of things to come, it is clear that the revolution in production, transportation, and communication that has occurred within the last generation means a revolution in law as well. There can be no denial of the law's lag heretofore in the critical area of land use control, and increasing knowledge means a greater discrepancy between technology and the law is likely. Some feel the courts will respond to the needs of our dynamic society:

Judges are not aware of the profound changes in land use development brought about by the decentralization of population and industry and are likely to be increasingly sympathetic to the efforts of hard pressed local communities to solve the resultant problems.²¹

One hopes that this will be the case, but such sympathy is not reflected in recent court decisions in the crucial areas of subdivision control. The courts still base their reasoning on whether there is "equal protection," or a "taking" of property -- the same old judicial pegs that have served for so long. These are eighteenth century approaches to a

²¹Cutler, "Legal and Illegal Methods for Controlling Community Growth in the Urban Fringe," 1961 Wisc. L. R. 370, 397 (1961).

twentieth century problem.²² The courts must find and utilize twentieth century doctrines if our communities are to exercise control over subdivision of land adequate to provide orderly community development.

²²Dukeminier, supra note 7, at 713.

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BIOGRAPHICAL SKETCH

Richard Meek Yearwood was born March 28, 1934, in Knoxville, Tennessee. He was graduated from Fulton High School in Knoxville, in June, 1952. In June, 1954, he received the A.A. degree from Gardner-Webb College. From 1954 until 1956 he was in the United States Army, and was stationed in Germany for one year. Following his discharge he enrolled at The University of Tennessee, which granted his A.B. in 1958, and the M.A. in 1959. In 1959 he entered the graduate school of the University of Florida to pursue work toward a doctorate in political science. He served as a teaching assistant for one year, and was then named a fellow. After completing course work and examinations, he left Florida to become an assistant professor of history and political science at Millikin University. After teaching one year at Millikin he joined the faculty of The University of Tennessee. He resigned from Tennessee in 1964, in order to do research in planning. He was employed by the Tennessee State Planning Commission and then by the Western North Carolina Regional Planning Commission, which he was named to direct in late 1964. He continued to work on his dissertation while working full time.

Richard Meek Yearwood is married to the former Betty Ann Lebow, and they are parents of three children. He is a member of the American Political Science Association, the Southern Political Science Association, the American Institute of Planners, the American Society of Planning Officials, Pi Sigma Alpha, and Phi Delta Theta.

This dissertation was prepared under the direction of the chairman of the candidate's supervisory committee and has been approved by all members of that committee. It was submitted to the Dean of the College of Arts and Sciences and to the Graduate Council, and was approved as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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